Supreme Court, U.S.
FILED

94 283 AUG 15 1994

No. 94- OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY, and
UNITED TRANSPORTATION UNION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

1994

QUESTIONS PRESENTED

1. Whether the provisions of the Railway Labor Act, 45 U.S.C. §§151 *et seq.*, permit union shop agreements requiring payment of full monthly dues in order to maintain and accumulate seniority in a craft, when the employee is transferred to another craft represented by a different union which also has a union shop agreement that is satisfied by membership in the union representing the original craft by reason of 45 U.S.C. §152 Eleventh (c)?

2. Whether the Court of Appeals erred in concluding that neither the union representing the craft of locomotive engineers nor locomotive engineers holding seniority and employment rights as trainmen have a legal interest obligating that they receive notice and the right to participate in an arbitration proceeding involving a railroad and the trainmen's union, which arbitration considered and imposed a seniority maintenance fee payable to the trainmen's union upon those engineers desiring to maintain and accumulate seniority in the trainmen's craft?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

PROCEEDINGS BELOW 2

FACTS 7

REASONS FOR GRANTING THE WRIT 11

I. THE DECISION BELOW FAILS TO FOLLOW THE PRIOR TEACHINGS OF THIS COURT ... 13

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD AND OTHER COURTS OF APPEALS UNDER THE NLRA 23

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR AUTHORITATIVELY SETTING THE SCOPE OF PERMISSIBLE UNION FEE OBLIGATIONS UNDER THE RLA AND ALSO THE GUIDELINES FOR APPLICATION OF *TRANS WORLD AIRLINES* IN POST-CERTIFICATION CASES 25

CONCLUSION 26

APPENDICES

APPENDIX A Decision By The United States Court of Appeals for the Eighth Circuit 1a

TABLE OF CONTENTS – Continued

Page

APPENDIX B Memorandum Opinion and Order of U.S. District Court for the Western District of Missouri..... 19a

APPENDIX C Excerpts From NLRA and RLA....37a

TABLE OF AUTHORITIES

Page

CASES:

Birkholz v. Dirks, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 15

Brotherhood of Locomotive Firemen & Eng. v. NMB, 410 F.2d 1025 (D.C. Cir. 1968), *cert. denied sub nom. Louisville & Nashville R.R. v. NMB*, 396 U.S. 878 (1969) 6, 22

Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768 (1952) 19

Cole v. Erie Lackawanna Ry., 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977) 22

Communications Workers v. Beck, 487 U.S. 735 (1988) ..... *passim*

Connecticut Nat. Bank & Germain, 503 U.S. ___, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) 13

Dempsey v. Atchison, Topeka and Santa Fe Ry. Co., 16 F.3d 832 (7th Cir. 1994), *pet. for cert. pending*, No. 93-2015 (June 21, 1994) 11, 24

Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435 (1984) 11, 14

English v. Burlington Northern R.R., 18 F.3d 741 (9th Cir. 1994) 22

Felter v. Southern Pacific Co., 359 U.S. 330 (1959) .. 19, 20

Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) 14

Hawaiian Airlines, Inc. v. Norris, 512 U.S. ___, 62 U.S.L.W. 4537 (U.S. June 20, 1994) 14

Illinois Central R.R. v. Brotherhood of Locomotive Engineers, 443 F.2d 136 (7th Cir. 1971) 6, 22

TABLE OF AUTHORITIES – Continued

Page

International Union of Electronic Workers, Local 444 (Paramax Systems Corp.), 311 N.L.R.B. 1031 (1993) 15, 23

Kidwell v. Transportation Communications Int'l Union, 946 F.2d 283 (4th Cir. 1992), *cert. denied*, 112 S. Ct. 1760, 118 L. Ed. 2d 423 (1992) 11

McElroy v. Terminal Railroad Ass'n of St. Louis, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969) 19

NLRB v. General Motors Corp., 373 U.S. 734 (1963) 16, 24, 25

NLRB v. Manitowac Engineering Co., 909 F.2d 963 (7th Cir. 1990) 16

O'Connell v. Erie Lackawanna R.R., 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 15

O'Neill v. Public Law Board No. 550, 581 F.2d 692 (7th Cir. 1978) 22

Pattern Makers League v. NLRB, 473 U.S. 95 (1985) 16, 17, 25

Public Service Co. of Colorado, 89 N.L.R.B. 418 (1950) 24

Radio Officers v. NLRB, 347 U.S. 17 (1954) ..... *passim*

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 14

Taylor v. Missouri Pacific R.R., 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, 479 U.S. 1018 (1986) 19

Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Transportation-Communications Employees v. Union Pacific R.R., 385 U.S. 157 (1966) 5, 20, 21

United Transportation Union v. Burlington Northern, Inc., 563 F.2d 1279 (8th Cir. 1977) 5, 21

United Transportation Union-E v. Burlington Northern, Inc., 470 F.2d 813 (8th Cir. 1972) 21

STATUTES:

Judicial Code

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 2

28 U.S.C. §1331 2

28 U.S.C. §1337 2

National Labor Relations Act

29 U.S.C. §§151 *et seq* 2

Sec. 7, 29 U.S.C. §157 14

Sec. 8(a)(3), 29 U.S.C. §158(a)(3) ..... *passim*

Railway Labor Act

45 U.S.C. §§151 *et seq* 2

Sec. 2 Third, 45 U.S.C. §152 Third 3, 4, 5, 7

Sec. 2 Fourth, 45 U.S.C. §152 Fourth ..... *passim*

Sec. 2 Eleventh, 45 U.S.C. § 152 Eleventh 13, 15, 19, 24, 25

Sec. 2 Eleventh (a), 45 U.S.C. § 152 Eleventh (a) 6

Sec. 2 Eleventh (c), 45 U.S.C. § 152 Eleventh (c) .. *passim*

TABLE OF AUTHORITIES – Continued

Page

Sec. 3 First (j), 45 U.S.C. §153 First (j) 21

Sec. 5 First, 45 U.S.C. §155 First 8

Sec. 6, 45 U.S.C. §156..... 7

Sec. 10, 45 U.S.C. §160..... 8

OTHER:

Exec. Order 12714 (May 3, 1990)..... 8

Public Law 102-29, 105 Stat. 1269 (April 18, 1991)...8, 9

Report of Presidential Emergency Board 219 .....8, 9

No. 94-___

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY, and
UNITED TRANSPORTATION UNION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, Brotherhood of Locomotive Engineers, H. L. Smith, G. D. McLaughlin and L. D. Wilson, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on May 26, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals is not officially reported but may be found at 146 LRRM (BNA) 2553 (8th

Cir. 1994). The opinion of the District Court for the Western District of Missouri was filed on July 1, 1993, and is unreported. They appear in the Appendix, hereinafter designated "App.", at 1a-18a and 19a-36a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on May 26, 1994. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, and the district court had jurisdiction based upon 28 U.S.C. §§ 1331, 1337 and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151 *et seq.*, along with selected excerpts from the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, are set forth in the Appendix at pages 37a-43a.

STATEMENT

PROCEEDINGS BELOW

This case stems from a dispute over the validity of a side letter appended to an award arising out of interest arbitration between respondent, The Kansas City Southern Railway Company ("KCS"), including what was formerly the Louisiana and Arkansas Railway, and

respondent, United Transportation Union ("UTU"). App. 2a. UTU is the authorized collective bargaining representative for the train service crafts employed by KCS. However, the craft of locomotive engineers (sometimes referred to as "engine service") on KCS is represented by petitioner, Brotherhood of Locomotive Engineers ("BLE"). Side Letter No. 3 to the Award of Crew Consist Arbitration Board No. 4 places the following requirement, effective with the date of the award, upon train service employees transferring to engine service: "Full dues to the UTU will be required while maintaining and accumulating train service seniority under the revised Crew Consist Agreement as set forth by the Award." App. 6a. In other words, conductors and trainmen promoted and working as locomotive engineers are required to pay "full dues to the UTU" in order to "maintain[] and accumulat[e] train service seniority." AA. 92.[1]

On September 15, 1992, BLE and three engineers/trainmen employed by KCS filed a complaint in the federal district court for the Western District of Missouri seeking declaratory and injunctive relief. The complaint questioned the validity of Side Letter No. 3, on the ground that it required KCS to collect or assist in the collection of improper dues, fees or other assessments to UTU in violation of Sections 2 Third and Fourth of the RLA, 45 U.S.C. § 152 Third and Fourth, or, if a qualified union shop arrangement under Section 2 Eleventh (a) of the RLA, it failed to comply with Section 2 Eleventh (c),

---

[1] References to "AA" herein are to the appellants' appendix filed in the Court of Appeals.

45 U.S.C. § 152 Eleventh (c). In sum, the individual engineers contended that requiring them to pay "full dues" to UTU in order to retain their seniority ranking or sequential numbering on the trainmen's seniority rosters denied them of their freedom of choice in belonging to either BLE or UTU, or to no union; illegally promoted dual unionism in violation of the alternative membership provisions of Section 2 Eleventh (c); and further violated Sections 2 Third and Fourth by encouraging UTU members becoming locomotive engineers to remain members of UTU upon transferring and becoming members of the craft of locomotive engineers represented by BLE.

The complaint also alleged that the side letter was beyond the jurisdiction of Crew Consist Arbitration Board No. 4 and was invalid because neither BLE nor the individual engineers/trainmen were given notice and allowed to participate in the proceeding with respect to the side letter's subject matter, as to which they had a bargainable, legal and/or pecuniary interest. AA. 8, 11-13.

On cross-motions for summary judgment, the trial court granted respondents' motion, finding the dispute to be a "major" one (App. 27a); that BLE (not the individuals) was entitled to notice if "adversely affected by the outcome" (App. 29a); that the "side letter, however, does not *adversely* affect the BLE," because it does not "change or amend any of BLE's seniority agreements" and "only affects a KCS worker who wants to continue accumulating train service seniority while working outside of the train service craft"; that, therefore, BLE was not an interested party entitled to notice (App. 31a); that the National Labor Relations Act cases holding similar payments for

retention of seniority rights were illegal union security arrangements were not applicable to this RLA case and, therefore, Sections 2 Third and Fourth had not been violated (App. 32a-33a); and that the argument of the engineers/trainmen that they were being compelled to pay monthly dues to UTU in violation of Section 2 Eleventh (c), which permits payment of dues to either BLE or UTU in satisfaction of any union shop requirement in train and engine service was flawed, because Section 2 Eleventh (c) "only prohibits dual unionism as a condition of employment," where here the condition for payment of dues is something less than termination of employment – reduction in rank on the trainmen's seniority roster which might at some future date adversely affect employment – and because the engineer is not precluded from joining BLE. App. 34a, 35a-36a.

The district court's entry of summary judgment for UTU and KCS was affirmed on May 26, 1994, on the basis that there are no genuine issues of material fact and, as a matter of law, Side Letter No. 3 does not violate the RLA. App. 18a. The Court of Appeals rejected the contention that petitioners had a "legal interest" permitting them to notice and the right to participate in any arbitration over Side Letter No. 3 under the doctrine established by the Court in *Transportation-Communications Employees v. Union Pacific R.R.*, 385 U.S. 157 (1966), or by the Eighth Circuit in *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977), or that petitioner BLE had an "economic stake" and "bargainable interest" in the subject matter of the Side Letter where the matter of

union fees previously had been "the subject of joint negotiations and agreement," for which proposition petitioners had cited, for example, *Illinois Central R.R. v. Brotherhood of Locomotive Engineers*, 443 F.2d 136 (7th Cir. 1971), and *Brotherhood of Locomotive Firemen & Eng. v. NMB*, 410 F.2d 1025, 1031 and 1035 (D.C.Cir. 1968), *cert. denied sub nom. Louisville & Nashville R.R.*, 396 U.S. 878 (1969) App. 9a. The Eighth Circuit also rejected the claim that Side Letter No. 3 is a union shop agreement under Section 2 Eleventh (a) of the RLA or requires UTU membership, stating (App. 12a):

> Granted, continued membership in UTU may well be in the best interests of a recently promoted engineer, at least in the short term. But the RLA does not prohibit a union representing one craft from negotiating terms with the employer that may render membership in that union more attractive to some employees than membership in another union for which those employees may be eligible.

Finally, the court below rejected the argument that the side letter violated Section 2 Fourth on grounds that the side letter does not provide for dues deduction and, therefore, could not establish any "unilateral wage deduction by KCS for union dues" (App. 15a); the language contained in Section 2 Fourth of the RLA is not similar to "the unfair labor practices provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 8 (sic) (1988)" and, therefore, refused to follow RLA precedent (App. 15a-16a); and there was "no evidence of anti-union animus or attempted interference", as it held was required by the Court's decision in *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426

(1989), in order for a cause of action to lie under Sections 2 Third and Fourth of the RLA. App. 18a.

FACTS

As bargaining representative for the craft of locomotive engineers on KCS, BLE has a collective bargaining agreement which contains a union shop agreement. UTU has separate collective bargaining agreements with KCS for the train service crafts represented by it. Those agreements also contain union shop provisions. In accordance with Section 2 Eleventh (c), the union shop provisions executed by both unions permit the requirement to be satisfied by payment of union fees to either union. Thus, a train service employee could satisfy UTU's union shop provision by being a member of or by paying union fees to BLE. Conversely, an engineer can satisfy BLE's union shop requirement by membership in UTU. Locomotive engineers generally are promoted from the craft of trainmen and, until the side letter in question, would become members of BLE.

In 1988, the various railroads of the nation and the railway unions were able to serve notices pursuant to Section 6 of the RLA, 45 U.S.C. § 156, and to bargain upon the rates of pay, rules and working conditions for the craft(s) each labor organization represented. BLE sought to change its agreements for locomotive engineers on some railroads, including KCS. UTU separately served notices for the employees it was bargaining agent on certain railroads represented by the National Railway Labor Conference ("NRLC"), which included KCS. Each of the railway labor organizations negotiated separately

with the NRLC on all items but health insurance. Each union was unable to settle its differences with the NRLC. Eventually, the National Mediation Board terminated its mediatory efforts and, as provided in Section 5 First of the RLA, 45 U.S.C. § 155 First, proffered arbitration to the railroads and ten of the unions, which included BLE and UTU.

Subsequently, still unable to obtain arbitration commitments or bargaining agreements, the Mediation Board requested President George Bush appoint an emergency board covering the disputes with the ten railway unions pursuant to Section 10 of the RLA, 45 U.S.C. § 160. By Executive Order 12714 published on May 3, 1990, the President established Presidential Emergency Board No. 219 ("PEB") to investigate these disputes. On January 15, 1991, PEB 219 presented its Report to the President, which contained recommendations with respect to the separate dispute of each union with the railroads represented by the NRLC. AA. 101-103. Insofar as UTU's dispute, the PEB recommended, *inter alia*, that UTU negotiate agreements with the individual railroads reducing the number of train service employees in an operating crew, and also that all remaining trainmen be compelled to take promotion to locomotive engineer. AA. 89, 102-103.

Nevertheless, the unions and railroads remained at impasse on their respective disputes. A series of strikes led to passage of Public Law 102-29, 105 Stat. 169, on April 18, 1991. In this statute, Congress imposed the recommendations of the PEB (with procedures for resolution of issues in disagreement) as a series of agreements

"hav[ing] the same effect as though arrived at by agreement of the parties under the Railway Labor Act (45 U.S.C. 151 et seq.)." P.L. 102-29, § 1(3). Contrary to the statement of the court below (App. 8a), BLE and KCS had not independently reached agreement on the same crew consist issues, and had no reason to do so. The agreements imposed by congressional action were the recommendations of PEB 219 as to each dispute. Accordingly, BLE and KCS never discussed crew consist issues. The PEB recommendations required UTU to negotiate with each carrier on that issue and provided a procedure (arbitration) to resolve that issue with the involved railroad. AA. 102-103.

It was KCS and UTU that bargained locally on the crew consist issue. AA. 91. Unable to reach any agreement, the crew consist matter was submitted by them to interest arbitration in accordance with the procedures contained in the recommendations of the PEB. *Id.* The National Mediation Board created Crew Consist Arbitration Board No. 4 to hear the case, and the Arbitration Board held hearings on December 18 and 19, 1991. *Id.* Neither BLE nor any engineers/trainmen were notified or invited to participate in the proceedings before the Board. AA. 91-92.

On March 16, 1992, Crew Consist Arbitration Board No. 4 issued its Final Award. AA. 92. Although neither union shop provisions nor contributions to unions, and their attendant costs of collection to railroads, were matters before the PEB or referred to in its recommendations to the President, the Final Award contained Side Letter

No. 3[2], and the provision reading: "Full dues to the UTU will be required while maintaining and accumulating train service seniority under the revised Crew Consist Agreement as set forth by the Award."[3]

The individual petitioners were working as junior locomotive engineers for KCS at the time of the proceeding before the trial court, but each of them hold seniority and employment rights in the train service crafts. AA. 86, 96-97. As junior engineers, they are the first furloughed in the case of a reduction in the number of engineers required by the railroad's business needs and accordingly must continue to work from time to time in train service. App. 3a; AA. 177-178.

Each of these engineers/trainmen do not want to pay union fees to UTU, but wish to belong to and pay dues to BLE. AA. 15. From the legalization of the limited form of

---

[2] The Court of Appeals apparently found something significant to the fact that the letter was undated and unsigned. App. 5a at n.3. Apparently, the court below failed to realize that the letter was part of the Award of the Crew Consist Arbitration Board, which, as interest arbitration, became the agreement of the parties. The Award was signed by the arbitrators on March 16, 1992. AA. 132.

[3] "Full dues" includes monthly payments to the UTU's International, UTU's General Committee of Adjustment on KCS, the local division and UTU's legislative board, if any, within the state in which the individual's local division is located. Neither respondents nor the court below explained the manner in which the seniority protection fee is attributable to the collective bargaining activities of each of these separate units or the hardship (other than possibly monetary) imposed upon each of these UTU units by the individual's transfer to engine service. The full text of Side Letter No. 3 is set out at App. 5a-6a.

union shop for railroad employees in 1951, UTU (and its predecessors) and BLE copied the language of Section 2 Eleventh (c) in their union shop agreements, and, until Side Letter No. 3, the individual engineers/trainmen need only pay union fees to either BLE or UTU in satisfaction of any union shop requirement.[4] AA. 88, 99-100. As a result of the side letter, only payment of full dues to UTU will satisfy both the financial requirements of the union shop agreements and the seniority maintenance fee side letter.

REASONS FOR GRANTING THE WRIT

The issues involved are novel ones under the RLA arising from a unique factual situation. The case raises an important question of federal labor relations law which had never been decided under the RLA until the decision rendered herein and by the Seventh Circuit in *Dempsey v. Atchison, Topeka and Santa Fe Ry. Co.*, 16 F.3d 832 (7th Cir. 1994), *pet. for cert. pending*, No. 93-2015, filed on June 21, 1994. That question as to whether specific evidence of

[4] As a result of the decisions in *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435 (1984), and *Kidwell v. Transportation Communications Int'l Union*, 946 F.2d 283 (4th Cir. 1992) *cert. denied*, 112 S. Ct. 1760, 118 L. Ed. 2d. 423 (1992), it is clear that a railroad employee need not belong to the union but can pay it "agency fees." While the RLA and NLRA permit agreements requiring all employees to become union members as a condition of continued employment, "the 'membership' that may be so required has been 'whittled down to its financial core' ". *Communications Workers v. Beck*, 487 U.S. 735, 745 (1988).

anti-union animus or of an intent to discourage membership in the bargaining representative (BLE) must be produced by engineer employees in order to maintain an action of improper assistance in the collection of union fees those employees must pay UTU in order to maintain and accumulate seniority in the crafts represented by UTU, while working in a craft represented by BLE, has been decided under the NLRA in the exactly opposite way from the opinion below. Although the issues may be raised in a unique factual situation, they, and the underlying problems from which they stem, are recurring ones in the railroad industry and will not merely disappear.

Therefore, the questions raised herein, whether or not decided correctly below, merit the Court's attention, for the rulings requested are significant to the adequate administration of the RLA. But we submit the decision below is incorrect, in that it is in direct conflict with the applicable statutory provisions, contravenes the teachings of this Court in its prior rulings and also is in opposition to the decisions of the other circuits and the National Labor Relations Board under the NLRA. Most critically, as petitioners established in *Dempsey*, if both unions are entitled to negotiate seniority protection fee arrangements and to strike to enforce their demands, engineers/trainmen will be subjected to compulsory dual unionism in contravention of Section 2 Eleventh (c) of the RLA. Moreover, the increased tensions arising out of the ebb-and-flow of employees between those crafts will jeopardize the public interest in the untampered flow of interstate commerce.

I. THE DECISION BELOW FAILS TO FOLLOW THE PRIOR TEACHINGS OF THIS COURT.

A.

Sections 2 Fourth and Eleventh prohibit the assessment and collection of dues, fees, assessments or other contributions payable to unions, except for the limited union shop provisions permitted by Section 2 Eleventh. The RLA makes no provision for seniority maintenance dues payments and for the assistance in their collection by railroads. The decision below, however, clearly contravenes the expressions of the Court in various cases, such as *Connecticut Nat. Bank v. Germain*, 503 U.S. ___, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391, 397 (1992): "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." By contradicting the plain meaning of the RLA that any union fee arrangement must qualify as a union security agreement under Section 2 Eleventh in order to collect such fees from employees, the decision below departs from the rules of statutory construction set forth by the Court and presents a question of law that is novel under the RLA and worthy of review.

B.

The decision below also fails to follow the test promulgated by the Court in determining whether well-established precedent under the NLRA should be applied in a similar situation arising under the RLA. During the past term of the Court, the test was summarized and stated to be a three-prong one: (1) common purposes; (2) parallel development of RLA and NLRA law; and (3)

desirability for a uniform common law of labor law. *See Hawaiian Airlines, Inc. v. Norris*, 512 U.S. ___, 62 U.S.L.W. 4537 at 4542 n.9 (U.S. June 20, 1994).

The Court of Appeals' decision did not consider any of these factors and is incompatible with each of the three test points. Both Sections 1a of the RLA, 45 U.S.C. § 151a, and Section 7 of the NLRA, 29 U.S.C. § 157, provide for the common purposes of freedom of association and stability of collective bargaining relationships, which are fully applicable to the situation at bar. There has been a parallel and identical development of RLA and NLRA law upon the non-discriminatory assessment of monies from employees for the collective bargaining purposes of the bargaining agent. In *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944), the Court implied from a reading of Section 2 Fourth of the RLA, 45 U.S.C. § 152 Fourth, that railroad unions owe the members of their craft a duty of fair representation. This duty was extended to employees and their unions covered by the NLRA in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). In *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435 (1984), the Court held that a railroad employee could not be required by an agreement made pursuant to Section 2 Eleventh of the RLA to pay fees and assessments that were not related to its collective bargaining activities. Subsequently in *Communications Workers v. Beck*, 487 U.S. 735, 762 (1988), the Court concluded that Section 2 Eleventh of the RLA and Section 8(a)(3) of the NLRA are statutory equivalents and held that employees under the NRLA may be required to pay only those fees and dues necessary for the employees' representative to deal with

their employer on labor-management issues. It is a combination of the union's fiduciary duty of fair dealing and the prohibition upon the assessment and collection of union fees except in accordance with a statutorily permitted union shop arrangement that underlined the application by the National Labor Relations Board of Section 8(a)(3) of the NLRA to bar arrangements like that before the Court in this case, and was the basis of this Court's seminal decision in *Radio Officers v. NLRB*, 347 U.S. 17 (1954). *See, e.g., International Union of Electronic Workers, Local 444 (Paramax Systems Corp.)*, 311 N.L.R.B. 1031 (1993). Finally, a uniform common law on seniority protection fees would have the same desirable effects under both statutes, including protection against free riders while protecting the employee from compulsory dual unionism,[5] protection of the individual employee's right to choose or reject a union, and diminution of potential disruptions to rail service by increased competition between the involved craft representatives as to employees ebbing-and-flowing between the engine and train service crafts.

---

[5] If the seniority maintenance fee is a union security arrangement, and we submit it is, it also contravenes Section 2 Eleventh (c), which permits payment of fees to either UTU or BLE to satisfy any such requirement. *See Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969); *O'Connell v. Erie Lackawanna R.R.*, 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969). Concluding the side letter was not a union shop provision under Section 2 Eleventh, the courts below did not mention these cases.

C.

In erroneously refusing to follow the applicable NLRA authorities, the opinion below improperly defined "condition of employment" for union security purposes as limited to termination of employment, and incorrectly imposed specific evidence of anti-union animus or attempted interference as an indispensable element of proof of violation of Sections 2 Fourth and Eleventh by the involved union fee arrangement.

If the lower court had followed the NLRA authorities and thusly this Court's decisions in *Radio Officers v. NLRB ("Radio Officers")*, 347 U.S. 17 (1954), *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985), it would have been required to conclude that a condition of employment is something significantly less than being dismissed and that any act that naturally encourages or discourages union membership or payment of union fees to a particular union is presumed to have been intended by the employer and labor organization and, therefore, transcends the permissible scope of any union fee arrangement.

In *Radio Officers*, the Court established that any effect upon any employment relationship, including seniority ranking, which causes the employee to receive a benefit or suffer some detriment, thereby tending to coerce the individual into paying dues or fees, joining the union, or becoming a union advocate or supporter, is sufficient to constitute a violation of Section 8(a)(3) of the NLRA. The opinion in *Radio Officers* and its progeny, such as *NLRB v. Manitowac Engineering Co.*, 909 F.2d 963 (7th Cir. 1990),

refer to accrued seniority in the sense of numerical standing or ranking on the seniority roster. In the last cited case, for example, the individuals violating the payment requirement had their seniority and right to work diminished, not extinguished, by their transfer or promotion. Yet, the fee requirement was found improper.

Further, this Court has rejected the conclusion below that "condition of employment" is the correlative of "termination of employment" by finding "unpersuasive" the argument that provisions like those set forth in Side Letter No. 3 "do[] not interfere with workers' employment because offending members are not discharged." *Pattern Makers League v. NLRB*, 493 U.S. 95, 107 (1985).

Moreover, in *Radio Officers*, 347 U.S. *supra* at 44, the Court held that "specific evidence of intent to encourage or discourage [union membership] is not an indispensable element of proof of violation of 8(a)(3)." On this point, in terms applicable to this case, the Court said:

> This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. [Citations omitted]. Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence. In such circumstances intent to encourage is sufficiently established.

Id., 45 (Footnotes omitted). In fact, disparate wage treatment and difference in the treatment of seniority are examples of "discrimination so foreseeably causing employee response as to obviate the need of any other proof of intent." *Id.*, 46.

D.

In refusing to follow *Radio Officers* and the other applicable NLRA authority, the court below relies upon an expansive reading of *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989), as always requiring a showing of anti-union animus or employer interference with the intentional or avowed purpose of interfering with the union's bargaining agency in any post-certification conduct. *Trans World Airlines*, however, was a strike crossover case. It did not deal with the conduct of a carrier with one bargaining representative which "inherently encourages or discourages union membership" in a second bargaining representative that the employer is obligated to meet and treat with under the RLA. *Radio Officers Union v. NLRB*, 347 U.S. *supra* at 45. Moreover, this reading of *Trans World Airlines* fails to recognize that it dealt with Section 2 Fourth in the context of the exercise of an employer's economic self-help powers after exhaustion of the RLA dispute resolution procedures and then only in regard to the proposition that "[n]either the RLA itself nor any analogies to the NLRA indicate that the crossover policy adopted by TWA during the period of self-help was unlawful." *Id.*, 443. In addition, two factors arise here that were not present in that case. By reason of the fact that payment of the "full dues" will satisfy both UTU's seniority protection scheme

and the union shop provisions in effect, the transferred train service employees will no longer "continue to bear the burden of paying" union dues to BLE, as bargaining representative for the craft of locomotive engineers. Unlike the situation in *Trans World Airlines*, the transferees are not foreclosed from "[f]ree riding on the benefits that may come to these employees as a result of [BLE's] status" as the engineers' bargaining representative. *Id.*, at 436 n.2. Likewise, there is a clear "prospect of a continuing diminution of seniority" after transfer, unless "full dues" are paid UTU. *Id.*, 437; *see also* App. 30a. These references in *Trans World Airlines, Inc.*, establish that the specific showing of anti-union animus against the second union in this scenario is not a prerequisite to determining the validity of the labor contract under Sections 2 Fourth and Eleventh of the RLA. In fact, this Court has decided on a number of previous occasions that RLA contract validity questions are for the courts, that the courts could determine validity through declaratory relief without a prior showing of anti-union animus, and, if invalid under the RLA, the federal courts are required to exercise their injunctive powers to enforce the commands of the RLA. *See Brotherhood of R.R. Trainmen v. Howard*, 343 U.S. 768, 774 (1952); *Felter v. Southern Pacific Co.*, 359 U.S. 326, 327 n.3 (1959). *Also see, McElroy v. Terminal Railroad Ass'n of St. Louis*, 392 F.2d 966 (7th Cir. 1968), *cert. denied*, 393 U.S. 813 (1969); *Taylor v. Missouri Pacific R.R.*, 794 F.2d 1082 (5th Cir. 1986), *cert. denied*, 479 U.S. 1018 (1986). In *Felter v. Southern Pacific Co., supra*, the Court found an arrangement between the railroad and the trainmen's union that required an employee to use a prescribed form, which had to be obtained from the

union, in order to stop his payment of union fees and slowing, if not preventing, his attempt to join an alternate organization sanctioned by the RLA was illegal under the RLA. The Court asserted that an arrangement of this sort, while insignificant in appearance, was contrary to the statutory policy sanctioning "organizational efforts," and had a chilling effect on permissible membership. 359 U.S. *supra* at 337-338.

In sum, there is no justification whatsoever for defining "condition of employment" as used in the two statutes differently or for denying these employees covered by the RLA the treatment affording employees under the NLRA relative to the payment of fees to one union when contractually forced to transfer out of one craft to work in another. A carrier and one union should not be entitled by agreement to deprive a railroad employee of his association choice and his employment rights in violation of the commands of the RLA.

It is submitted that this Court should grant this petition in order to resolve the conflict between the opinion below and the teachings enunciated by the Court in its previous decisions defining the federal common law of labor relations.

E.

To the extent that the decision below asserts that the petitioners were not entitled to notice of and to participate in the proceedings before Crew Consist Arbitration Board No. 4 insofar as the subject matter of Side Letter No. 3, it also conflicts with the rationale expressed by the Court in *Transportation-Communications Union v. Union*

Pacific R.R., 385 U.S. 157 (1966). In fact, the decision below would justify revisiting the decision in *Transportation Communications Union*. In that case, the Court held that the RLA arbitration board was required to resolve jurisdictional contract disputes involving two unions and their respective contracts in a proceeding in which both participate and the decision is based on the language of all agreements.

Based upon the logic flowing from its decision that employees and their union, which have not participated in an arbitration proceeding determining rights in two or more crafts, are not bound by that arbitration award, a number of the circuits have held in various contexts that the employees and their representative are entitled to notice of the proceedings and to participate in the hearing. Thus, in *United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d 1279 (8th Cir. 1977), and *United Transportation Union-E v. Burlington Northern, Inc.*, 470 F.2d 813 (8th Cir. 1972), it was held that disputes as to the seniority ranking of promoted engineers who ebb-and-flow between that craft and the train service crafts represented by UTU should be submitted to arbitration boards before which all parties have a right to participate in the hearing with "the right to sit as a member of [the] arbitration panels." *See United Transportation Union v. Burlington Northern, Inc.*, 563 F.2d *supra* at 1284. In view of the aggrieved employee's interest in the arbitration proceedings and the RLA provision requiring the individual receive "due notice of all hearings," 45 U.S.C. §153 First (i), the Sixth and Ninth Circuits also have held that the employee who could be affected by the arbitrator's ruling is entitled to "actual notice" of the board's hearing. *See*

English v. Burlington Northern R.R., 18 F.3d 741 (9th Cir. 1994); *Cole v. Erie Lackawanna Ry.*, 541 F.2d 528 (6th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977). *Contra: O'Neill v. Public Law Bd. No. 550*, 581 F.2d 692 (7th Cir. 1978).

Conversely, even assuming the side letter was a negotiated agreement between UTU and KCS that became an attachment to the award of Crew Consist Arbitration Board No. 4, as respondents claimed and the district court accepted in finding the dispute covered by the major disputes procedures of the RLA, there has been a recognition that each organization, BLE and UTU, have a "bargainable interest" in the ebb-and-flow between the crafts and in insuring their respective members' employment rights are not impaired. This type of "bargainable interest" was referred to in the context of engineer training and promotion in *Brotherhood of Locomotive Firemen & Eng. v. Nat'l Mediation Board*, 410 F.2d 1025, 1031 (D.C. Cir. 1968). *See also* at 1035 (Burger, J. concurring).

In addition, in *Illinois Central R.R. v. Brotherhood of Locomotive Engineers*, 443 F.2d 136 (7th Cir. 1971), the court had before it a situation, like here, where the matter had been in the past "the subject of joint negotiations and agreement", and each union had "an important economic stake in the rules." *Id.*, 141-42. By reason of the interrelationship of the two crafts and the historical treatment of the subject matter, the court held that BLE and UTU "had joint jurisdiction over the subject matter" and accordingly concluded that the UTU "be given the right to participate in the negotiations of the subject Section 6 notice." *Id.*, 144.

Under the circumstances, the decision below raises an important issue of federal law that requires this Court's guidance for these parties, other unions and other railroads, and the various government agencies that apply the procedures of the RLA.

II. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD AND OTHER COURTS OF APPEALS UNDER THE NLRA.

As the above discussion establishes, the NLRB and the courts upon review of the Board's decisions have uniformly interpreted union security agreements under the NRLA as requiring, at most, that employees pay periodic dues and initiation fees as a condition of employment. Until *Communications Workers v. Beck*, 487 U.S. 735 (1988), however, employees under the NLRA could be required to tender full initiation fees and dues, unlike employees governed by the RLA, who were only obligated to remit their "fair share" of the union's representative costs.

On the other hand, the NLRB and the courts held that the 1947 amendments to Section 8(a)(3) outlawed the closed shop "while preserving union shops and lesser forms of union security." *International Union of Electronic Workers, Local 444*, 311 N.L.R.B. 1031, at 1036 (1993). As the Board stated in the cited case, " . . . Congress never specified what 'union shop' meant. Senator Taft, a sponsor of the 1947 amendments, conceded that 'the union shop is not defined. No one knows what it is. We did not

use the term in the bill.' Leg. Hist. 1408 (LMRA 1947)." *Id.* This Court's opinion in *NLRB v. General Motors Corp.*, 373 U.S. 734, 739 (1963), confirms that comment, for the Court described the prevailing administrative and judicial view of Section 8(a)(3) as covering the "union shop, as well as less onerous union security arrangements, if they were otherwise legal." Thus, contrary to the decision below, payments of sums of money "for the support of the bargaining unit," as in *Public Service Co. of Colorado*, 89 N.L.R.B. 418 (1950), are considered union-security arrangements that are less severe than a closed or union shop, but nevertheless subject to the limitations of Section 8(a)(3).

In sum, the decision below and that entered shortly prior to it by the Seventh Circuit in *Dempsey v. Atchison, Topeka and Santa Fe, supra*, are the only decisions under the RLA on these questions, and both are contrary to the well-established law under the NLRA, which has defined "union-security arrangements" and "condition of employment" in a totally different manner. Since the Court reviewed the court of appeals' decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988) to bring uniformity of interpretation under Section 8(a)(3) and Section 2 Eleventh, it should grant review in the instant case because of the congruity between these sections and the similarity of legislative intent.

III. THIS CASE IS AN APPROPRIATE VEHICLE FOR AUTHORITATIVELY SETTING THE SCOPE OF PERMISSIBLE UNION FEE OBLIGATIONS UNDER THE RLA AND ALSO THE GUIDELINES FOR APPLICATION OF *TRANS WORLD AIRLINES* IN POST-CERTIFICATION CASES.

This case treats with a novel issue in a factual situation under the RLA that can be expected to multiply in the industry during the next several years if the decision below is allowed to stand. The factual situation provides an appropriate vehicle for the Court to define with finality the permissible contractual language of union fee arrangements under the RLA. With respect to the NLRA, the Court has already articulated the applicable standard in *Radio Officers Union v. NLRB*, 347 U.S. 17, 40-41 (1954); *NLRB v. General Motors Corp.*, 373 U.S. 734 at 742 (1963); and *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985). Because such arrangements under the RLA have historically copied the statutory language of Section 2 Eleventh of the RLA, the Court has never had to interpret Sections 2 Fourth and Eleventh in the context of a seniority maintenance fee, nor has it been required to define "condition of employment" as used in the RLA for this purpose. We submit that this case provides the Court with the timely opportunity to render those determinations.

This case also presents an excellent situation for issuing guidelines as to the application of Section 2 Fourth to post-certification conduct by a carrier in accordance with the rationale enunciated in *Trans World Airlines*. As previously noted, the decision below relies upon an expansive reading of *Trans World Airlines*, one always requiring a showing of anti-union animus or employer conduct with

the avowed purpose of interfering with the union's bargaining agency after the union's certification. However, *Trans World Airlines* did not have reference to post-certification conduct of an employer with another bargaining representative which inherently encourages membership in that union at the expense of a second bargaining representative that the employer is required to meet and treat with under the RLA. In view of the contrary NLRA precedents, this case provides the opportunity to determine whether the overly broad reading of *Trans World Airlines* by the Court of Appeals was proper under the circumstances.

CONCLUSION

The decision below is in direct conflict with decisions of this Court and distorts the holding and rationale of *Trans World Airlines*. It raises novel, but fundamental, recurring questions under the RLA as to employer-union actions that serve to restrict railroad employees' freedom of union choice and freedom from paying compulsory union fees, questions which have been decided in a contrary manner under the NLRA. This case serves as an excellent opportunity to set the appropriate standard for

use of NLRA precedent in RLA cases and also the guidelines as to the permissible range, if any, of statutorily authorized union security arrangements under the RLA.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 93-2944

Brotherhood of Locomotive Engineers; H. L. Smith; G. D. McLaughlin; L. D. Wilson, Appellants, v. The Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; United Transportation Union, Appellees.	* * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri

---

Submitted: January 13, 1994

Filed: May 26, 1994

Before BOWMAN and WOLLMAN, Circuit Judges, and ALSOP*, Senior District Judge.

---

* The HONORABLE DONALD D. ALSOP, Senior United States District Judge for the District of Minnesota, sitting by designation.

BOWMAN, Circuit Judge.

The Brotherhood of Locomotive Engineers and three individuals (collectively, BLE) brought suit against the Kansas City Southern Railway Company (KCS) and the United Transportation Union (UTU) seeking declaratory and injunctive relief under the Railway Labor Act (RLA), 45 U.S.C. §§ 151-188 (1988), to invalidate and to enjoin enforcement of a side letter to the labor agreement between UTU and KCS, an agreement to which BLE was not a party. The District Court[1] granted summary judgment for KCS and UTU, and BLE appeals. We affirm.

BLE is a railroad union and the recognized bargaining representative for KCS's locomotive engineers.[2] UTU likewise is a railroad union, the authorized bargaining unit for KCS employees who are members of what is known in the industry as the "train service" craft: conductors, brakemen, and switchmen. Both unions thus have collective bargaining agreements with KCS, and both of those agreements contain "union shop" provisions. Under § 2 Eleventh of the RLA, a union and a railroad may enter into an agreement that requires all employees in certain crafts to join the union within sixty days of employment. 45 U.S.C. § 152 Eleventh (a). This is known as a union shop or union security agreement. Congress added § 2 Eleventh, the union shop provision, to the RLA in 1951 so that all employees would be compelled to share in the costs of union representation. *Ellis*

---

[1] The Honorable Dean Whipple, United States District Judge for the Western District of Missouri.

[2] BLE also represents firemen who work for KCS on what was formerly the Louisiana and Arkansas Railway.

v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435, 446 (1984).

The seasonal nature of some railroad work and the consequent mobility of operating employees among the crafts, most especially between engine service and train service, makes union shop obligations in the railroad industry more onerous than they are in other industries. *See Dempsey v. Atchison, Topeka & Santa Fe Ry.*, 16 F.3d 832, 837 (7th Cir. 1994). As the need for engineers increases, railroads draw new engineers from train service. When fewer engine service positions are available, junior engineers are bumped back to train service. Thus union shop obligations present railroad operating employees with a Hobson's choice: either "belong to two unions – one representing each of his crafts – or . . . shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits." *Pennsylvania R.R. v. Rychlik*, 352 U.S. 480, 490 (1957). Congress therefore modified the RLA's union shop provision to the extent that those employees in the operating crafts may satisfy a union shop obligation by membership in any national labor organization that represents the carrier's operating employees, is organized under the RLA, and is qualified as an elector of the union representatives on the National Railroad Adjustment Board. 45 U.S.C. § 152 Eleventh (c); *Rychlik*, 352 U.S. at 485. Thus, a train service employee promoted to engineer, possibly involuntarily and often temporarily, need not give up his UTU membership and join BLE in order to meet his union shop obligation. Likewise, a junior engineer bumped back to

train service as the need for engineers wanes may maintain his membership in BLE, assuming he has joined that union, and thus satisfy the union shop requirement. Any employee is free to resign membership in one union and join any other for which he is eligible. The employee may maintain multiple memberships, but he cannot be required to do so.

Beginning in 1988 and through 1991, BLE, UTU, and KCS were involved in nationwide negotiations made necessary when the railroads sought to reduce the number of workers on each train. On May 3, 1990, with the issue unresolved, President George Bush created Presidential Emergency Board 219 (PEB 219) to investigate the disputes upon which the parties were unable to reach agreement and to report its findings. On January 15, 1991, PEB 219 issued recommendations that the individual parties negotiate (rather than continuing with futile nationwide negotiation), to be followed by binding arbitration in the cases where negotiation at the local or regional level failed. Many of the parties then reached agreement. KCS and UTU were not among them.

In view of the important national interest in maintaining essential transportation services, Congress voted to impose the recommendations of PEB 219 upon those parties with unresolved issues, as though the parties themselves had agreed to those recommendations. Settlement of Railroad Labor-Management Disputes, Pub. L. No. 102-29, 105 Stat. 169 (1991). UTU and KCS went to arbitration and finally reached a new "crew consist" agreement, *i.e.*, an agreement concerning reduction in crew size. Side Letter No. 3, the focal point of contention in this case, was a part of the final arbitration package.

That letter agreement requires those train service employees transferring to engine service to continue paying dues to UTU if (but only if) they wish to continue to accrue train service seniority. Failure to pay UTU dues freezes the employee's train service seniority at the level it was when he moved to engine service, but does not reduce train service seniority already earned during his tenure with KCS. The practical effect, then, of a train service employee's failure to pay dues to UTU after transfer to engine service is that junior engineers who are laid off in engine service when engineer positions are cut back may find themselves unable to return to train service if they have been bypassed in seniority by more junior employees who have less continuous service with KCS overall but more accumulated train service seniority as a UTU member.

The text of Side Letter No. 3,[3] as reproduced in Appellants' Appendix, is as follows:

> Dear Sirs:
>
> In view of the changes set forth in this Award concerning the existing Crew Consist Agreement, the following will apply to future train service employees transferring to engine service:
>
> Effective with the date of this Award, train service employees transferring to engine service will have their train service seniority placed in leave of absence status and will continue to accumulate such seniority. This will apply to the

---

[3] The letter, at least as reproduced in the record before this Court, is undated and unsigned.

> period of time that such employees are required to protect their engine service seniority. Full dues to the UTU will be required while maintaining and accumulating train service seniority under the revised Crew Consist Agreement as set forth in the Award. The Carrier is instructed to advise the UTU General Chairman in writing, when train service employees are transferred to engine service.

BLE argues that Side Letter No. 3 and the manner in which it was negotiated (that is, without giving BLE the opportunity to be included in the negotiations) violate various provisions of the RLA. Because judgment was granted on a motion for summary judgment, we review de novo, and will affirm if we determine there are no genuine issues of material fact and that judgment as a matter of law is appropriate. *Scheideman v. West Des Moines Community Sch. Dist.*, 989 F.2d 286, 288 (8th Cir. 1993). We find it helpful to our discussion to address BLE's arguments in the reverse of the order presented to this Court in the briefs.

I.

BLE claims that, under the RLA, it was entitled to notice and an opportunity to participate in the arbitration and negotiation between UTU and KCS where the side letter agreement was reached. Although BLE's brief does not refer this Court to the statutory authority for the notice and right to participate to which it claims to be entitled, the union apparently is relying upon § 6 of the RLA, which provides in pertinent part:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an *intended change in agreements affecting rates of pay, rules, or working conditions*, and the time and place for the beginning of conference between the representatives of *the parties interested in such intended changes* shall be agreed upon within ten days after the receipt of said notice. . . .

45 U.S.C. § 156 (emphasis added).

In spite of a fair amount of discussion in the briefs, there apparently is no dispute that Side Letter No. 3 is an "agreement[] affecting rates of pay, rules, or working conditions."[4] Looking to the nature of the dispute out of which Side Letter No. 3 arose, the crew consist arbitration arguably was intended to result in changes affecting UTU's agreement with KCS concerning rules or working conditions. The question remains whether BLE was a "part[y] interested in such changes" within the meaning of the RLA, as UTU and KCS clearly were, such that it was entitled to notice. We hold that it was not.

We cannot deny that BLE was "interested" in the ultimate result of the arbitration; this lawsuit is clear evidence of that. But we do not think that Congress intended mere interest in the subject or outcome of a dispute to require that a union be given statutory notice

---

[4] Because the controversy over the side letter concerns the creation of contractual rights, it is, in RLA parlance, a "major" or "interest" dispute, as opposed to a "minor" or "grievance" dispute that arises either out of the interpretation or application of an existing agreement or from a grievance lodged under the terms of the agreement. *See Consolidated Rail Corp. v. Railway Labor Executives, Ass'n*, 491 U.S. 299, 302 (1989).

of, much less a right to participate in, negotiations or arbitration between another union and the employer. The distinctive division of railroad employees under the RLA into crafts or classes, and the regular movement of employees among the crafts that is characteristic of the industry, portends overlapping "interests" among bargaining units in the composition of the crafts and in their labor agreements. That sort of interest, however, does not confer upon all unions the right to notice and participation in the arbitrations of all other unions. "An analysis of the bargaining process refutes the idea that the 'parties interested in such intended changes' would or could include all those persons who might be affected by the changes or the unions of which they were members." *Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F.2d 726, 732 (5th Cir.), *cert. denied*, 361 U.S. 899 (1959). Further, the phrase "rates of pay, rules, or working conditions" is a term of art in labor law, "a shorthand abbreviation of labor bargaining." *Id.* The RLA requires bargaining in railway labor disputes to take place between the railroad and the certified representative of the craft or class, 45 U.S.C. § 152 Ninth, in this case KCS and UTU. The railroad's duty to bargain does not extend to the certified representative of a craft or class whose collective bargaining agreement is not the subject of the dispute.

BLE's claim of a "bargainable interest" in UTU's crew consist dispute with KCS is particularly specious in view of the fact that BLE and KCS had independently reached agreement on the same crew consist issues (presumably without notice to UTU). *See* Brief for Appellants at 5. The KCS-UTU arbitration sought to reach a crew consist

agreement pertaining to UTU members, and while Side Letter No. 3 may (or may not) have an effect on BLE membership rosters, it does not impact any BLE-KCS *agreement* affecting rates of pay, rules, or working conditions. *See Pittsburgh & Lake Erie R.R. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 503-04 (1989) (holding no notice was required before sale of railroad's assets, as the sale would not affect any written or implied agreement on working conditions). Again, the agreement that was changed was between UTU and KCS, not between BLE and KCS.

In its reply brief BLE suggests that the individual appellants were entitled to notice separate and apart from BLE. We agree with the Tenth Circuit, however, that "[t]he bargaining agent is the representative of the craft" and § 6 does not require "personal notice to employee." *McMullans v. Kansas, Okla. & Gulf Ry.*, 229 F.2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

The cases cited by BLE as persuasive authority need not detain us long. They concern representational disputes between two unions where one of them, but only one, was going to acquire a new employee group to represent; or they deal with a tripartite agreement (among a railroad and two unions) that covered working conditions within two crafts. Clearly both unions in each such case would have a "bargainable interest," and no useful analogies can be drawn between those cases and the situation we face here. We hold that neither the individual appellants nor the BLE were entitled to § 6 notice of the negotiation and arbitration that led to Side Letter No. 3.

II.

BLE also contends that Side Letter No. 3 violates RLA § 2 Eleventh (c). As discussed above, under the terms of § 2 Eleventh (c), a railroad operating employee subject to union shop obligations cannot be forced to join the union representing his craft if he is a member in good standing of a union representing another operating craft (yet he is always free to switch affiliation to any union for which he is eligible if he so chooses). BLE contends that Side Letter No. 3 is in substance a union shop agreement that requires dual union membership in violation of subparagraph (c). We disagree.

Under § 2 Eleventh (a), a railroad and an authorized union are permitted "to make agreements, requiring, as a condition of continued employment that . . . all employees shall become members of the labor organization representing their craft or class." 45 U.S.C. § 152 Eleventh (a). Thus the RLA authorizes union shop agreements. Section 2 Eleventh (c), which provides that union shop agreements may be satisfied by membership in another union, is applicable only to a "requirement of membership in a labor organization in *an agreement made pursuant to subparagraph (a).*" 45 U.S.C. § 152 Eleventh (c) (emphasis added). "In other words, the prohibitions against dual unionism contained in Section 2, Eleventh (c) only kick in when the agreement at hand purports to be a union shop agreement made pursuant to Section 2, Eleventh (a)." *Dempsey*, 16 F.3d at 838. BLE argues that Side Letter No. 3 is in fact a subparagraph (a) agreement because it requires UTU membership "as a condition of continued employment" in substance if not in form or, in

the alternative, because it modifies the collective bargaining agreement between UTU and KCS, which is a subparagraph (a) agreement, and thus should itself be treated as a subparagraph (a) agreement.[5] We find those arguments unpersuasive.

Membership in UTU is not a condition of continued employment under the terms of Side Letter No. 3. No engineer, regardless of whether he came to that position via train service, may be terminated for failure to join or to retain membership in UTU. No employee, returning to train service having joined BLE, may be terminated for declining to join UTU. No accumulated seniority in train service will be lost if a junior engineer/former trainman declines to retain membership in UTU. BLE argues that UTU membership becomes a condition of employment because a junior engineer recently promoted to that position and thus low in engine service seniority, who chooses not to retain UTU membership, might be bumped back to train service but without sufficient accrued train service seniority to regain employment there, resulting in his furlough; were the furlough to last for more than a year, he would be ineligible for recall, and then he would

---

[5] We reject without further discussion and as improper argument BLE's allegations, based not upon anything in the record here but upon BLE's reading of old cases, that UTU's side letter agreement with KCS reflects a historical pattern of attempts "to use the union shop requirements to threaten and coerce railroad employees to become members of its organization rather than belong to the rival or alternate organizations recognized and sanctioned by the RLA as the representatives of the operating crafts of railroad employees." Brief for Appellants at 41.

be out of work. We are not persuaded by this argument, for the scenario it presents is far too speculative to permit us to hold that Side Letter No. 3 requires UTU membership as a "condition of continued employment."

We also reject the argument that the side letter modifies a true subparagraph (a) agreement (the overall UTU-KCS agreement) and thus qualifies as a subparagraph (a) agreement itself. The side letter is exactly that, a supplementary agreement in addition to the main agreement, and the text does not suggest that it is modifying any particular provision of an existing agreement. The side letter concerns itself only with the time that train service employees spend working outside the craft.

Even if we were to hold that Side Letter No. 3 is a union shop agreement under subparagraph (a), we would still reject BLE's argument because the side letter does not require UTU membership in addition to affiliation with another craft union, a requirement that would be prohibited by subparagraph (c). Nothing in the plain language of Side Letter No. 3 prevents a railroad employee from quitting UTU when he is not working as a train service employee and switching union affiliations if he so chooses. Granted, continued membership in UTU may well be in the best interests of a recently promoted engineer, at least in the short term. But the RLA does not prohibit a union representing one craft from negotiating terms with the employer that may render membership in that union more attractive to some employees than membership in another union for which those employees may be eligible. No one is forced to join a particular union but is free to choose, assuming eligibility. Competition among

the unions, short of compelled membership, is not illegal under the RLA.

BLE also claims that Side Letter No. 3 "upsets the sharing of costs of representation promoted by the 1951 amendments" and that it "was entered into with the intent of upsetting the financial support for BLE's collective bargaining activities." Brief for Appellants at 44, 45. Apart from explaining to us the duties it has as bargaining representative for the engineers, BLE does not elaborate on how § 2 Eleventh (c) is violated. UTU has parallel duties to its members, the train service employees, and thus does in fact share in the costs of representation. In any case, as far as we can discover, the RLA was not enacted to ensure the continued financial stability of any union, and the law does not purport to guarantee a particular level of member support. It is clear that the BLE, in making this argument, misapprehends the purpose and scope of the RLA. The Supreme Court found that Congress enacted § 2 Eleventh in 1951 in response to concerns that "all members of a bargaining unit . . . pay their fair share of the costs of performing the function of exclusive bargaining agent," *Ellis*, 466 U.S. at 446, and to our knowledge the Court has said nothing about § 2 Eleventh's purpose being to facilitate cost-sharing among the unions. Moreover, BLE directs us to nothing in the record that suggests it was ever UTU's or KCS's intent to interfere with BLE's financial support (assuming that the side letter will even have that effect, a matter not yet known), and such an intent cannot be attributed to KCS or UTU absent any evidence to support the attribution.

III.

BLE also challenges Side Letter No. 3 as a violation of paragraphs Third and Fourth of RLA § 2, which provide for designation of labor representatives, and for the freedom to organize and to bargain collectively, without interference from the carrier. 45 U.S.C. § 152 Third, Fourth.

BLE's first argument on this issue is that Side Letter No. 3 violates the RLA because it is an attempt by the employer to deduct union dues from employee wages. Such action would be prohibited by § 2 Fourth, which makes it unlawful for employers "to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions." 45 U.S.C. § 152 Fourth. Involvement by the railroad in the collection of dues is permitted, however, under § 2 Eleventh (b), which allows a railroad and an authorized bargaining representative (union) "to make agreements providing for the deduction by [the railroad] from the wages of its . . . employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues . . . uniformly required as a condition of acquiring or retaining membership," but only with the written authorization of the employee. 45 U.S.C. § 152 Eleventh (b); *see also id.* § 152 Eleventh (d) (amending § 152 Fourth to the extent it conflicts with § 152 Eleventh). BLE argues that, if Side Letter No. 3 is not a union shop agreement under § 2 Eleventh (a) (and we have held in Part II that it is not), then the agreement

cannot be valid under § 2 Eleventh (b), and is per se invalid under § 2 Fourth.

BLE misreads § 2 Eleventh (b). That subparagraph permits the employer, by agreement of all parties involved and without regard to whether that agreement is a union shop agreement, to deduct union dues from wages. Unlike § 2 Eleventh (c), *see supra* at 8-9, subparagraph (b) does not reference subparagraph (a) wherein the authority to make union shop agreements is set out. Although a railroad cannot unilaterally deduct from wages for union dues, it may do so by agreement with the union and with the consent of the employee, irrespective of whether the union and the railroad have a union shop agreement.

It is true that the side letter would violate § 2 Fourth if it provided for unilateral wage deduction by KCS for union dues. But Side Letter No. 3 by its terms is neither an agreement with UTU to deduct dues nor a unilateral pronouncement by KCS that it will deduct dues from wages. If deductions for dues are authorized at all, presumably it is the overall KCS-UTU agreement that so provides. No dues are deducted pursuant to Side Letter No. 3.

BLE's argument that the side letter violates RLA § 2 Third and Fourth because it "interfere[s] with, influence[s], or coerce[s] [KCS employees] in [their] choice of representatives," 45 U.S.C. § 152 Third, and "influence[s] or coerce[s] employees in an effort to induce them to join or remain or not to join or remain members of any labor organization," *id.* § 152 Fourth, is also flawed. BLE would have us hold that this language is for our purposes the

same as the unfair labor practices provision of the National Labor Relations Act (NLRA), 29 U.S.C. § 8 (1988), and then apply NLRA precedent here. We decline to do so.

We initially note that "[t]he NLRA . . . exempts employees who are subject to the Railway Labor Act, and the inapplicability of § 8(b) to railroad employees was specifically pointed out during the congressional debates on the NLRA." *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 391 (1969) (citations omitted). Thus "the NLRA has no direct application to the present case." *Id.* at 377.

Notwithstanding the inapplicability of the NLRA to railroad employees, there is no question that judicial decisions on issues raised under the RLA may be informed by "carefully drawn analogies from the federal common labor law developed under the NLRA." *Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 432 (1989). We will not find NLRA precedent persuasive, however, in the face of relevant RLA precedent. *See Dempsey*, 16 F.3d at 840-41. Given the RLA precedent that we cite below, we reject BLE's attempts to induce us to apply contrary NLRA authority.

Paragraphs Third and Fourth of § 2 are part of the 1934 amendments to the RLA, and the Supreme Court from the beginning has "viewed [the amendments] as addressing primarily the precertification rights and freedoms of unorganized employees." *Trans World Airlines*, 489 U.S. at 440. The Court found that the ability of railroad employees to select their representatives without

interference from the railroad, and thus to have representation independent of the railroad, was essential to effective implementation of the RLA's "exhaustively detailed procedural framework 'to facilitate the voluntary settlement of major disputes.' " *Id.* at 441 (quoting *Jacksonville Terminal*, 394 U.S. at 378). KCS employees are organized and have been for years. Both BLE and UTU (or their predecessors) were certified as bargaining representatives of KCS employees long ago, and no one is suggesting that another union be certified to replace BLE or UTU. Thus there is no precertification or decertification issue here. BLE remains free to represent, and continues to represent, engine service employees of KCS.

We do not hold, however, that causes of action under § 2 Third and Fourth are available *only* in precertification cases, but the availability of the remedy is limited in postcertification circumstances. This Court has held, in a postcertification case, that no cause of action lies under § 2 Third when the complaining party "fail[s] to present adequate evidence that [the railroad's] actions have been motivated by anti-union animus or that [the railroad's] actions were an attempt to interfere with its employees' choice of their collective bargaining representative." *Tello v. Soo Line R.R.*, 772 F.2d 458, 462 (8th Cir. 1985). We hold that the same applies to an action under § 2 Fourth. *See National R.R. Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990).

BLE claims interference with its representation of KCS employees as a result of Side Letter No. 3, but nowhere in the record before us can we find any evidence (as distinguished from conclusory statements) of anti-

union animus on the part of KCS. Moreover, BLE's argument that KCS is favoring one union over another belies any suggestion that KCS harbors hostility to yard unions in general. Side Letter No. 3 does not, either overtly or inherently, discourage union activities or discriminate against those who encourage such activities. Further, there is nothing in the record that raises a genuine issue of fact as to whether KCS was attempting to interfere with its employees' selection of BLE as a bargaining representative when it negotiated Side Letter No. 3 with UTU. Because we find no evidence of anti-union animus or attempted interference, we hold that Side Letter No. 3 does not violate RLA § 2 Third and Fourth.

We agree with the District Court that there are no genuine issues of material fact and that, as a matter of law, Side Letter No. 3 does not violate the RLA. Therefore the District Court's summary judgment for UTU and KCS is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JUDGMENT IN A CIVIL CASE

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.,	)	
Plaintiff,	)	Civil Action Number:
vs.	)	93-5073-CV-SW-1
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, et al.,	)	(Filed Jul. 1, 1993)
Defendant.	)	

__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

X **Decision by Court.** This action has come before the court as a briefed matter and a decision has been rendered.

Accordingly, it is

ORDERED that plaintiffs' Motion for Summary Judgment is DENIED. It is further

ORDERED that defendants' Motion for summary Judgment is GRANTED.

Entered On JUL 2 1993

July 1, 1993
Date

R. F. Connor
Clerk

/s/ Carol Kuhl
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, et al.	)	
Plaintiffs	)	No. 92-5073-CV-W-8/1
v.	)	
THE KANSAS CITY SOUTHERN RAILWAY COMPANY, et al.	)	(Filed Jul. 1, 1993)
Defendants	)	

ORDER

There are two motions before the court: plaintiff's Motion for Summary Judgment and defendants' Cross-Motion for Summary Judgment. For the reasons stated below, the court denies plaintiff's motion and grants defendants' motion.

I. Background

Plaintiffs, the Brotherhood of Locomotive Engineers (BLE) and three trainmen-engineers, ask the court for injunctive and declaratory relief to void a side letter to an agreement between defendants, the Kansas City Southern Railway Company (KCS) and the United Transportation Union (UTU). The BLE is a railroad union that represents locomotive engineers and some firemen on the KCS. The UTU is also a railroad union, but it represents the train service craft of conductors, brakemen and switchmen on the KCS. The KCS is a railroad that operates in Missouri and elsewhere.

In 1991, the UTU and the KCS were parties to a national round of negotiations between the railroads and the railroad unions. The railroads sought to reduce the number of workers required on each train, but the railroads and unions were unable to reach an agreement. President George Bush, by Executive Order Number 12714, appointed the Presidential Emergency Board 219 (PEB 219) to investigate the dispute and report its findings. The PEB 2I9 reported that the railroads had made a valid proposal to reduce the number workers manning each train, but stated the parties should bargain locally instead of nationally. The PEB 219 also made several recommendations to resolve the dispute and suggested that if the parties were still unable to make an agreement, they should submit the dispute to binding arbitration.

Some railroads and unions were able to reach an agreement based on the PEB 219's recommendations, but others, including the UTU and the KCS were not able to do so. The UTU and other unions nationwide went on strike and on the same day, Congress decided to intervene because it believed the strike threatened the national health and defense. Congress passed and President Bush signed Public Law Number 102-29 which made the recommendations of the PEB 219 binding upon the parties. Accordingly, the KCS and the UTU attempted once again to reach an agreement. When they failed to reach an agreement, the KCS asked the National Mediation Board to appoint an arbitration panel.

The National Mediation Board appointed the Crew Consist Arbitration Board Number Four (Board) to arbitrate the dispute between the KCS and the UTU using the

PEB 219's recommendations. The Board's final award includes Side Letter Number Three which reads:

> Dear Sirs:
>
> In view of the changes set forth in this Award concerning the existing Crew Consist Agreement, the following will apply to future train service employees transferring to engine service:
>
> Effective with the date of this Award, train service employees transferring to engine service will have their train service seniority placed in leave of absence status and will continue to accumulate such seniority. This will apply to the period of time that such employees are required to protect their engine service seniority. Full dues to the UTU will be required while maintaining and accumulating train service seniority under the revised Crew Consist Agreement as set forth in the Award. The Carrier is instructed to advise the UTU General chairman in writing, when train service employees are transferred to engine service.

The BLE argues that the side letter violates several provisions of the Railway Labor Act (RLA) and asks the court for declaratory and injunctive relief to void the side letter.[1] Defendants, of course, deny that the side letter

---

[1] Plaintiffs allege in their complaint that this court has jurisdiction under 28 U.S.C. §§ 1137 and 2201. The court is unable to find § 1137 and assumes it is a typographical error. Section 2201 gives the court the power to issue a declaratory judgment, but it does not give the court any jurisdiction. Plaintiffs do allege that the Railway Labor Act, 45 U.S.C. § 151 *et seq.* governs this case thus, they appear to allege the court has jurisdiction under 28 U.S.C. § 1331.

violates the RLA and argue that they are entitled to summary judgment. The parties do not dispute the material facts, only the application of the facts to the RLA, thus, summary judgment for either plaintiff or defendant is appropriate.

II. Motions for Summary Judgment

A. Summary Judgment Basics

A movant is entitled to summary judgment under Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, the moving party bears the burden of proof. *Aetna Life Ins. Co. v. Great Nat'l Corp.*, 818 F.2d 19, 20 (8th Cir. 1987). When considering a motion for summary judgment, the court must scrutinize the evidence in the light most favorable to the non-moving party and the non-moving party "must be given the benefit of all reasonable inferences." *Mirax Chem. Prods. Corp. v. First Interstate Commercial Corp.*, 950 F.2d 566, 569 (8th Cir. 1991) (citation omitted). If the moving party meets its burden of proof, the burden shifts to the non-moving party who must set forth specific facts showing that there is a genuine issue for trial to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The two requirements of Rule 56(c) are that there be (1) no genuine issue of (2) material fact. The United States Supreme Court explains that to establish a genuine issue

of fact sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). If a rational trier of fact considering the record as a whole could not find in favor of the non-moving party, then a trial is unnecessary. *Id.* Substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. In assessing whether a material fact is subject to a genuine dispute, a court should employ a standard essentially identical to that governing a motion for directed verdict under Rule 50(a). *Id.* at 250.

Finally, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court, concluded by encouraging the use of summary judgment in appropriate cases: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id.* at 327 (citations omitted). *See also, City of Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988) ("The motion for summary judgment can be a tool of great utility in removing factually insubstantial cases from crowded dockets, free courts' trial time for those cases that really do raise genuine issues of material fact."). However, a court should always be mindful that summary judgment is an extreme remedy. *Inland Oil &*

Transp. Co. v. United States, 600 F.2d 725, 727 (8th Cir.), *cert. denied*, 444 U.S. 991 (1979).

B. Railway Labor Act

Plaintiffs argue that Side Letter Number Three violates § 2 Third, Fourth, Seventh, Eleventh and § 3 Third (q) of the RLA.[2] The side letter does not violate the RLA, thus the court awards defendants summary judgment.

1. Standard of Review

The parties differ as to the standard of review of the Board's decision. Defendants argue that Public Law 102-29 and not the RLA governs the court's standard of review. Other public laws involving railroad disputes do expressly provide that the RLA governs subsequent arbitration, *See e.g., Maine Cent. RR Co. v. Brotherhood of Maintenance of Way Employees*, 873 F.2d 425, 428 (1st Cir. 1989), but the public law in the present case does not. The public law also does not contain its own standard for reviewing an arbitration board's award. It is not surprising that the public law does not provide for a standard of review given that Congress was under considerable pressure to quickly prevent a potentially devastating strike. The public law does, however, state in § 1 that "the report and recommendations of Presidential Emergency Board No. 219 shall be binding on the parties . . . and shall have the same effect as though arrived at by agreement of the

---

[2] 45 U.S.C. §§ 152, Third, Fourth, Fifth, Seventh, Eleventh and § 153, Third (q) respectively.

parties under the *Railway Labor Act*." Public Law 102-29, 105 Stat. 169 (April 18, 1991) (emphasis added). This language suggests Congress intended the RLA to govern the parties' negotiations in implementing the recommendations of the PEB 219. Further, defendants agree not only that the Board made the final award, but also that the National Mediation Board created and appointed the Board. The National Mediation Board is a creature of the RLA and must follow the Procedures of the RLA. Finally, the RLA governed the dispute both before and after the public law, thus there is no reason not to believe that the RLA governs the review of the Board's award. *See e.g.*, 45 U.S.C. §§ 157 & 160. All of these factors demonstrate that the applicable law which governs this case is Public Law 102-29 *and* the RLA. Regardless, without any other articulated standard of review, the court adopts the RLA's standard of reviewing the Board's arbitration award.

The RLA contains two separate sections that articulate a standard of review. Which section the court should use depends on if the dispute is classified as a "minor" or a "major" dispute. The United States Supreme Court explains the classification as follows:

> The first [major dispute] relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

> The second class [minor dispute], however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case.

Elgin, Joliet & E. R.R. Co. v. Burley, 325 U.S. 711, 723, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), aff'd 327 U.S. 661, 66 S. Ct. 721, 90 L. Ed. 928 (1946) (brackets added). *See also, Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 307, 109 S. Ct. 2477, 105 L. Ed. 2d 250 (1989) ("Where an employer asserts a contractual right to take the contested action, the ensuing dispute is minor if the action is arguably justified by the terms of the parties' collective-bargaining agreement.").

In the present case, the dispute is a "major" dispute. The KCS and the UTU were negotiating an agreement that would allow the KCS to reduce the number of workers required on each train and the side letter was an entirely new seniority provision that dealt with the accumulation of future seniority. The arbitration involved the formation of a new agreement on these issues, not the interpretation or application of an existing agreement. Further, the arbitration involved the acquisition of future rights, not pre-existing rights. Thus, the arbitration or dispute is a major dispute, not a minor one.

The court agrees with defendants that the standard of review articulated in § 3 of the RLA, 45 U.S.C. § 153, Third (q) does not apply because § 3 applies to minor and

not major disputes. Section 9 of the RLA, 45 U.S.C. § 159, provides the standard of review for major disputes. The court, under the RLA may void the Board's award if (1) the award does not conform to the requirements of the RLA; (2) the award does not conform to the stipulations of the agreement to arbitrate or (3) fraud or corruption tainted the Board's decision. § 45 U.S.C. § 159, Third.

2. Notice

One of the requirements of the RLA in a major dispute is for a railroad or union to give all interested parties a thirty-day notice of an intended change in pay, rules and working conditions. Section 2, Seventh of the RLA provides: "No carrier . . . shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." 45 U.S.C. § 152, Seventh. Section 6 of the RLA provides: "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice. . . . " 45 U.S.C. § 156. In the present case, because the KCS asked for arbitration, the KCS was required to give all interested parties thirty days' notice of its intention to reduce the number of workers on each train and to change the workers' rights to future train service seniority.

Public Law 102-29 did allow the parties to make an agreement that differs from the public law, but the parties were still obligated to follow the procedural requirements of the RLA. Thus, the KCS and the UTU were free to make an agreement on any issue they wished, but were required to give all interested parties notice of the issues they intended to change.

The BLE complains it was not given notice of the arbitration. The issue then is whether the BLE was an interested party and thus, entitled to notice. The RLA does not define "interested," but analogous cases outside our circuit do. In a Second Circuit case, the court had to determine which parties were entitled to notice of a National Railway Arbitration Board award. *Brotherhood of Maintenance of Way Employees v. St. Johnsbury & Lamoille County R.R./M.P.S. Assocs.*, 794 F.2d 816 (2nd Cir. 1986). The NRAB governs minor disputes, but as in major disputes, all parties "involved" in the dispute are entitled to notice. 45 U.S.C. § 153 First (j). Section 3 First (j) which requires the railroad or union to give notice to all parties "involved" in the dispute is the counterpart to § 6. The *St. Johnsbury* court defined a party who is "involved" in the dispute as one who "would be harmed or adversely affected by the outcome of the hearing." *St. Johnsbury*, 794 F.2d at 818 (citing the Fifth and Seventh Circuits). There does not appear to be any distinction between a party who is "involved" and one who is "interested" in the dispute. Using the *St. Johnsbury* definition also makes sense, because fairness or due process dictates that if an award will adversely affect a person, that person should know about and have an opportunity to appear before

the board making the award. Thus, under § 6, an "interested" party is one who would be harmed or adversely affected by the outcome of the hearing.

The BLE argues the side letter did adversely affect it and the individual plaintiffs because now newly promoted engineers will not join the BLE, rather they will join the UTU. To understand the BLE's argument, it is helpful to have some understanding of how a worker becomes and remains an engineer. In 1985, there was a national agreement between the UTU and various railroads which made the train service craft the main source of supply for new engineers. Today, if a train service worker is promoted to engineer, he or she becomes a junior engineer. When there is not enough work as an engineer, the junior engineer works in the train service craft until there is more engineering work or until he or she has enough engineering seniority to hold the position continually. If the junior engineer does not have enough train service seniority to work in the train service craft when there is not enough engineering work, he or she is furloughed until there is work available in either engineering or train service. A worker furloughed for one year loses all train service seniority.

The result, according to the BLE, is that newly promoted engineers are discouraged from joining the BLE because they would have to pay dues to the BLE and if they wish to continue to accumulate train service seniority, to the UTU as well. The court agrees that the side letter affects the BLE and the individual plaintiffs who want to join the BLE without paying dues to both the UTU and the BLE. The side letter, however, does not *adversely* affect the BLE. The BLE does not represent the

craft of train service workers and the side letter does not change or amend any of the BLE's seniority agreements. The side letter only applies to the future accumulation of train service seniority, not to seniority that a worker may have already obtained in the train service craft. An engineer who wants to continue to accumulate train service seniority is not precluded from joining the BLE, but must join the UTU. The side letter only affects a KCS worker who wants to continue accumulating train service seniority while working outside of the train service craft. The BLE was not an interested party in the dispute and thus, was not entitled to notice of the arbitration between the KCS and the UTU.

3. Designation of Representatives and Collective Bargaining

Plaintiffs' arguments as to § 2 Third[3] and Fourth[4] of the RLA are really the same argument: the side letter

---

[3] Section 2 Third, 45 U.S.C. § 152 Third, provides in part: Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other. . . .

[4] Section 2 Fourth, 45 U.S.C. § 152 Fourth, provides in part: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. . . . No carrier . . . shall deny . . . the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees or to use the funds of the carrier . . . to influence or coerce employees in

interferes with the workers' rights to designate a representative and interferes with workers' rights to organize and bargain collectively through representatives of their own choosing.

Section 2 Third and Fourth of the RLA are primarily concerned with precertification rights – rights workers have in their attempt to organize a union. *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426, 440, 109 S. Ct. 1225, 103 L. Ed. 2d 456 (1989). All of the KCS's engineers and train service workers are unionized, thus there is no dispute that the present case involves post-certification and not pre-certification of rights. Section 2 Third and Fourth are applicable to post-certification circumstances only when a railroad's conduct is motivated by "anti-union animus" or the railroad's actions were "an attempt to interfere with its employees' choice of their collective bargaining representative." *Tello v. Soo Line R.R. Co.*, 772 F.2d 458, 462 (8th Cir. 1985) (Section 2 Third); *National RR Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F.2d 43, 51 (1st Cir. 1990) (Section 2 Third and Fourth).

Plaintiffs claim that the side letter interferes with their right to collective bargaining and to choose their own representative. Neither plaintiffs nor their affidavits claim the KCS was motivated by "anti-union animus" or was intentionally trying to interfere with the collective bargaining process when it agreed to the side letter. Further, given that there is sufficient case law discussing the

---

> an effort to induce them to join or remain or not to join or remain members of any labor organization. . . .

elements of § 2 Third and Fourth, plaintiffs' citation to National Labor Relations Act cases are unpersuasive. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383, 89 S. Ct. 1109, 22 L. Ed. 2d 344 (1969) (The "National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes."). The court rejects plaintiffs' arguments that defendants violated § 2 Third or Fourth or both.

4. Dual Unionism

Plaintiffs also argue that the side letter violates § 2 Eleventh (c) of the RLA, 45 U.S.C. § 152 Eleventh (c)[5]

---

[5] The relevant parts of that section state that a railroad and a union are allowed:

> (a) to make agreements, requiring as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class. . . .
>
> . . . .
>
> (c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service . . . if said employee shall hold or acquire membership in any one of the labor organizations, national in scope. . . . [However], nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

because the side letter would require dual unionship in both the BLE and the UTU if an engineer wants to join or remain in the BLE. This argument is flawed.

Section 2 Eleventh gives the railroad unions the right to negotiate with the railroads for a union shop agreement. Subparagraph (a) authorizes union shop agreements and subparagraph (c) prevents union shop agreements from leading to compulsory dual unionism. *Pennsylvania R.R. Co. v. Rychlik*, 352 U.S. 480, 486-89, 77 S. Ct. 421, 1 L. Ed. 2d 480 (1957). The *Rychlik* Court explained that the only purpose of § 2 Eleventh (c) is to protect workers "from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative." *Id.* at 489. Both the BLE and the UTU have union shop agreements with the KCS, but as subparagraph (c) states, membership in the BLE satisfies the union shop agreement even though a BLE member may be temporarily working in train services.

Section 2 Eleventh prohibits dual unionism as a condition of employment. Subparagraph (c) prohibits any union shop agreements made pursuant to subparagraph (a) from requiring dual unionism. Subparagraph (a) refers only to union shop agreements made as a "condition of continued employment." Reading the two subparagraphs together, § 2 Eleventh only prohibits dual unionism as a condition of employment.

The side letter in dispute does not facially condition continued employment in the train services or at the KCS.

The side letter does not affect seniority a worker has already accumulated in the train services, only future seniority. Further, a BLE member working in train services continues to accumulate train service seniority. The side letter only requires a KCS worker to pay dues to the UTU if the worker wants to continue accumulating train service seniority while working outside of the train service craft.

Defendants argue that although the side letter is not a facial condition of continued employment, its effect conditions continued employment on paying dues to the UTU. An engineer, as explained earlier, may periodically work in train services when there is not enough engineering work. If the engineer does not have enough train service seniority, however, the engineer will be furloughed until work is available in either train services or engineering. The engineer will lose all of his or her train service seniority if furloughed for a year. Defendants argue that if the engineer does not pay dues to the UTU, under the side letter, the engineer will no longer accumulate train service seniority while working outside the train service craft thereby jeopardizing the engineer's continued employment.

Section 2 Eleventh does not guarantee that a worker will continue accumulating seniority in a craft other than the one he or she works in. The side letter does give workers paying dues to the UTU a benefit that others do not receive, namely the continued accumulation of train service seniority while working outside of the train service craft, but it does not condition continued employment on paying dues to the UTU. Section 2 Eleventh (c) is not applicable to the present case because the side letter

does not condition continued employment on paying dues to the UTU.

III. Conclusion

The side letter does not violate the RLA, therefore it is

ORDERED that plaintiffs' Motion for Summary Judgment is DENIED. It is further

ORDERED that defendants' Motion for Summary Judgment is GRANTED.

/s/ Dean Whipple
DEAN WHIPPLE
UNITED STATES DISTRICT JUDGE

DATED: July 1, 1993.

APPENDIX C

EXCERPTS FROM NLRA AND RLA

NATIONAL LABOR RELATIONS ACT
(49 Stat. 449, 29 U.S.C. §§151 et seq.)

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a) It shall be an unfair labor practice for an employer –

(1) to interfere with restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on

or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

Section 8(b) It shall be an unfair labor practice for a labor organization or its agent –

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership

therein; or (B) an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

THE RAILWAY LABOR ACT
(44 Stat. 577, 45 U.S.C. §§151 et seq.)

Section 1a The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

* * *

Section 2 *Third* – Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth – Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain

members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

Eleventh – Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted –

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is

not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the

First Division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said service.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

(2)

Supreme Court, U.S.
FILED
SEP 13 1994
OFFICE OF THE CLERK

No. 94-283

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY COMPANY,
and UNITED TRANSPORTATION UNION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENT UNITED TRANSPORTATION UNION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NORTON N. NEWBORN
(Counsel of Record)
NORTON N. NEWBORN CO., L. P. A.
24100 Chagrin Blvd., Suite 330
Cleveland, Ohio 44122
(216) 464-1400

Counsel for Respondent
United Transportation Union

BEST AVAILABLE COPY

23 pp

QUESTIONS PRESENTED

1. Whether Section 2 Fourth or Eleventh (c) of the Railway Labor Act, 45 U. S. C. Section 152 Fourth and Eleventh (c) make unlawful an agreement between the Kansas City Southern Railway Company and its train service employees' collective bargaining representative, United Transportation Union, whereby train service employees are required to pay dues to United Transportation Union in order to continue to accumulate train service seniority when working outside the train service crafts in engine service.

2. Whether the engine service craft collective bargaining representative as well as individual employees who hold engine service and train service seniority were entitled under the Railway Labor Act to notice of, and participation in, the negotiation or arbitration of the agreement referred to in Question No. 1.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT 6

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI 6

II. THE COURT BELOW DID NOT MISAPPLY THE RLA NOR DECISIONS OF THIS COURT IN REJECTING PETITIONERS' CLAIM THAT THEY WERE ENTITLED TO NOTICE AND PARTCIPATION IN THE NEGOTIATIONS AND ARBITRATION 7

III. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY *TRANS WORLD AIRLINES, INC. V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS* NOR OTHER DECISIONS OF THIS COURT 10

IV. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH (c) 11

V. CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Air Line Pilots Association v. Texas International Airlines, Inc., 656 F. 2d 16 (2nd Cir. 1981) 14

Air Line Pilots Association v. Transamerica Airlines, Inc., 817 F. 2d 510 (9th Cir. 1987) 14

Birkholz v. Dirks, 391 F. 2d 289 (7th Cir. 1968) 10

Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board, 410 F. 2d 1025 (D. C. Cir. 1968) 9

Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U. S. 369 (1969) 16

Carr v. Chicago Pacific and Western R. Co., No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), *appeal pending*, No. 94-2531 ..... 4, 6

Cole v. Erie Lackawanna Ry., 541 F. 2d 528 (6th Cir. 1976) 9

Communications Workers v. Beck, 487 U. S. 735 (1988) 14, 15

Dempsey v. The Atchison, Topeka and Santa Fe Railway Company, 16 F. 3d 832 (7th Cir. 1994), *petition for certiorari pending*, No. 93-2015 (June 21, 1994) 4, 6, 13

Ellis v. Brotherhood of Railway and Airline Clerks, 466 U. S. 435 (1984) 14, 15

English v. Burlington Northern, Inc., 18 F. 3d 741 (9th Cir. 1994) 9

Hawaiian Airlines, Inc. v. Norris, 512 U. S. ___, 62 U.S.L.W. 4537 (June 20, 1994) 15

TABLE OF AUTHORITIES – Continued

Page

Illinois Central R. Co. v. Brotherhood of Locomotive Engineers, 443 F. 2d 136 (7th Cir. 1971) 9

Independent Union of Flight Attendants v. Pan American World Airways, Inc., 789 F. 2d 139 (2nd Cir. 1986) 13

International Association of Machinists v. Northwest Airlines, Inc., 673 F. 2d 700 (3rd Cir. 1982) 14

McMullans v. Kansas, Oklahoma & Gulf Railway, 229 F. 2d 50 (10th Cir. 1956) 8

National Railroad Passenger Corporation v. International Association of Machinists, 915 F. 2d 43 (1st Cir. 1990) 13

NLRB v. Manitowoc Engineering Co., 909 F. 2d 963 (7th Cir. 1990) 15

O'Connell v. Erie Lackawanna R., 391 F. 2d 156 (2nd Cir. 1968) 10

Pattern Makers League v. NLRB, 473 U. S. 95 (1985) 15

Radio Officers Union v. NLRB, 347 U. S. 17 (1954) 15

Renneisen v. American Airlines, Inc., 990 F. 2d 918 (7th Cir. 1993) 13

Ruby v. Taca International Airlines, S. A., 439 F. 2d 1359 (5th Cir. 1974) 14

Steele v. Louisville and Nashville R. Co., 323 U. S. 192 (1944) 14

Tello v. Soo Line Railroad, 772 F. 2d 458 (8th Cir. 1985) 13

Texas and New Orleans R. Co. v. Railway Clerks, 281 U. S. 548 (1930) 14

TABLE OF AUTHORITIES – Continued

Page

Transportation-Communications Union v. Union Pacific Railroad Co., 385 U. S. 157 (1966) 8

Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, 489 U. S. 426 (1989) 5, 8, 11, 12, 15, 16

United Transportation Union v. Burlington Northern, Inc., 563 F. 2d 1279 (8th Cir. 1977) 8

United Transportation Union v. Burlington Northern Railroad, 470 F. 2d 813 (8th Cir. 1972) 8

Virginian Railway Co. v. System Federation, 300 U. S. 515 (1937) 5, 14, 15

STATUTES

Railway Labor Act, 45 U.S.C. Section 151 *et seq.*... 2, 14

Section 2 Third,
45 U.S.C. Section 152 Third 2, 11, 13

Section 2 Fourth,
45 U.S.C. Section 152 Fourth 5, 11, 12, 13, 15, 16

Section 2 Fifth,
45 U.S.C. Section 152 Fifth 11

Section 2 Eleventh,
45 U.S.C. Section 152 Eleventh 5, 10, 11

Section 3 First (q),
45 U.S.C. Section 153 First (q) 3

Section 6, 45 U.S.C. Section 156 2

Labor Management Relations Act

Section 8(a), 29 U.S.C. Section 158(a) 15

Section 8(b), 29 U.S.C. Section 158(b) 15

No. 94-283

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY COMPANY,
and UNITED TRANSPORTATION UNION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

BRIEF OF RESPONDENT UNITED TRANSPORTATION UNION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW AND JURISDICTION

Respondent accepts Petitioners' identification of the Opinions Below and the Jurisdiction of the Court. The Opinion below is reported at 26 F. 3d 787 (8th Cir. 1994).

STATUTORY PROVISIONS INVOLVED

With regard to "Statutory Provisions Involved", the Petition identifies several through the inclusion of Appendix C, Petitioners' Appendix ("Pet. App."), pp. 37a-43a. We note two points in regard to this identification of "Statutory Provisions Involved".

In Appendix C, Petitioner includes Section 2 Third of the Railway Labor Act, 45 U. S. C. Section 152 Third. (Pet. App. 40a.) While this provision of the Act was urged by Petitioners and rejected in the Court below, there is no argument in the Petition for Certiorari concerning Section 2 Third and accordingly, it should not be deemed "involved" in this Petition.

In regard to Petitioners' second "Question Presented", the statutory provision upon which the court below resolved the "Question", namely Section 6 of the Railway Labor Act, 45 U. S. C. Section 156, 26 F. 3d at 791-92 (Pet. App. 6a-9a), should be deemed a "Statutory Provision Involved" but is not included in Petitioners' Appendix.

STATEMENT OF THE CASE

This was an action by Petitioners Brotherhood of Locomotive Engineers ("BLE"), a labor organization, and three individuals who are employed and hold train service and engine service seniority with the Kansas City Southern Railway Company ("KCS"). BLE is the craft bargaining representative under the Railway Labor Act ("RLA"), 45 U. S. C. Section 151 *et seq.*, for the engineer

craft on KCS. United Transportation Union ("UTU") is the RLA craft bargaining representative for the train service craft employees on KCS.

Petitioners sued KCS and UTU over what was denominated Side Letter No. 3 to an arbitration award of March 19, 1992. The arbitration was an "interest" arbitration that resolved collective bargaining issues.

The disputed Side Letter No. 3 provided that effective with the date of the award, KCS train service employees transferring to engine service who wish to continue to accumulate more train service seniority while so working outside of train service, must pay dues to UTU during that time. The side Letter did not take away seniority upon transfer out of train service, but required the payment of dues to UTU for further accumulation while outside the train service craft. While the employee is in train service, or upon return to train service, the Side Letter does not apply. 26 F. 3d at 790-91 (Pet. App. 5a-6a.)

Petitioners filed a three count complaint challenging the Side Letter under the RLA. Count One alleged that Side Letter No. 3 should be invalidated on the basis of Section 3 First (q) of the RLA, 45 U. S. C. Section 153 First (q) on grounds that the Side Letter was outside the arbitration board's jurisdiction and that the Side Letter did not conform to the RLA in that BLE and the engineer employees were not given notice nor the opportunity to participate in the arbitration proceedings. (Appellants' Appendix in the court below, "AA", 5-7.)

Count Two alleged RLA Section 2 Third, Fourth, Fifth and Eleventh violations; Count Three alleged RLA Section 2 Fifth and Eleventh violations.

On cross motions for summary judgment, the district court granted Respondents' (defendants-appellees below) motions for summary judgment. (Pet. App. 19a-36a.) The district court was affirmed by the Eighth Circuit Court of Appeals without dissent. 26 F. 3d 787 (9th Cir. 1994); Pet. App. 1a-18a.

SUMMARY OF THE ARGUMENT

The petition for a writ of certiorari should be denied because Petitioners have established no basis for review by this Court. First, the opinion below is not in conflict with any other court of appeals decision. Each court to have considered the validity of the type of agreement at issue here has rejected Petitioners' RLA Section 2 Fourth and Eleventh claims, including two courts of appeals and three district courts. In addition to the decisions of the court of appeals and district court below, the same RLA challenges to such an agreement as is involved here were rejected in the court of appeals and district court in *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), with denial of a request for reconsideration by the panel and denial of hearing *en banc*, no judge of the court of appeals asking for hearing, *petition for certiorari pending*, No. 93-2015, June 21, 1994; and by the district court in *Carr v. Chicago, Central and Pacific Railroad Co.*, No. 92-C-5943, 1994 WL 234567 (n. D. Ill. May 26, 1994), appeal pending, No. 94-2531.

Second, the courts below properly held that where only the UTU-KCS agreement, and not any BLE-KCS agreement, was involved in the negotiations or "interest" arbitration, the RLA did not require notice to, or an opportunity for, participation by BLE. The court properly rejected Petitioners' reliance in this regard upon RLA Section 3, 45 U. S. C. Section 153, provisions for judicial review of grievance arbitration awards.

Third, the court below properly applied the law under Section 2 Fourth and the decisions of this Court in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants,* 489 U. S. 426 (1989) and *Virginian Railway Co. v. System Federation,* 300 U. S. 515 (1937). Section 2 Fourth prohibits carriers from acting with anti-union animus and from attempting to undermine, impair, or destroy a bargaining relationship. As the courts below noted, the undisputed facts here showed neither the requisite animus nor an attack on BLE as the bargaining representative.

Finally, the courts below properly found that RLA Section 2 Eleventh (c) has no application because that provision applies only where there is an agreement made pursuant to subparagraph (a), that is, one that requires union membership "as a condition of continued employment". The Side Letter at issue here requires union dues only as an option for accrual of additional seniority while working outside the craft, and does not require membership as a condition of continued employment.

ARGUMENT AND AUTHORITIES FOR DENIAL OF THE WRIT

I. PETITIONERS HAVE PRESENTED NO CREDIBLE REASON FOR THIS COURT TO GRANT THE WRIT OF CERTIORARI

Petitioners have not identified a reason for this Court to review the decision below. There is certainly no conflict among the Circuits. Indeed, the two courts of appeals to address the issue of the validity of the agreement at issue have each made a similar analysis to firmly reject Petitioners' position. In addition to the decision in the Court of Appeals for the Eighth Circuit in the present case upholding the agreement under Sections 2 Third and Fourth, see also *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), *petition for certiorari pending*, No. 93-2015. In both the *Dempsey* case from the Seventh Circuit and the present case, the courts of appeals affirmed summary judgment that had been granted by the district court. A third district court has also granted summary judgment on the same legal basis in *Carr v. Chicago Central and Pacific Railroad Company*, No. 92-C-5943, 1994 WL 234567 (N. D. Ill. May 26, 1994), appeal pending, No. 94-2531, United States Court of appeals for the Seventh Circuit.

Nor is there an "improtant issue of federal law. . . . " S. Ct. Rule 10. Petitioners' claims involve relatively arcane issues of RLA Section 2 Fourth and 2 Eleventh law and do *not* involve the threat of substantial labor disputes, terminations of employment or similar matters that are frequently the subject of litigation in the federal courts. The decision below simply requires an affected

train service employee to pay dues to UTU in order to continue to accumulate additional train service seniority while working outside the train service craft. This is not the type of substantial labor dispute that requires this Court's attention.

II. THE COURT BELOW DID NOT MISAPPLY THE RLA NOR DECISIONS OF THIS COURT IN REJECTING PETITIONERS' CLAIM THAT THEY WERE ENTITLED TO NOTICE AND PARTICIPATION IN THE NEGOTIATIONS OR ARBITRATION

Petitioners claim an RLA right to notice and an opportunity to participate in bargaining and interest arbitration concerning Side Letter No. 3. (Pet. 20-23.) The court below treated this issue first, noting that Petitioners did not indicate a specific RLA provision relied upon in this regard. In the absence of such, the court made the assumption that Petitioners relied upon Section 6 of the RLA, the provision of the law that generally regulates the commencement of bargaining. 26 F. 3d at 791. (Pet. App. 6a.)

The court below rejected Petitioners' claim to notice and participation on the basis that RLA bargaining pertains to agreements as to "rates of pay, rules, or working conditions", and that no BLE agreement pertaining to such was involved or impacted by the negotiations and arbitration of the disputed Side Letter. Accordingly, Petitioners had no RLA right to notice of, or participation in, the bargaining and arbitration. 26 F. 3d at 791-92 (Pet. App. 6a-9a.)

Contrary to Petitioners' suggestion (Pet., p. 10, fn. 2), the court below recognized and acknowledged that the Side Letter agreement " . . . was a part of the final arbitration package." 26 F. 3d at 790. (Pet. App. 4a.) The court, however, properly drew no distinction between the matter of BLE's entitlement to notice of the negotiations and notice of the interest arbitration. As the court said, the railroad's duty to bargain "does not extend to the certified representative of a craft or class whose collective bargaining agreement is not the subject of the dispute". " . . . [T]he agreement that was changed was between UTU and KCS, not between BLE and KCS." 26 F. 3d at 792. (Pet. App. 8a-9a.) If there were no entitlement of BLE to notice concerning bargaining over the UTU-KCS agreement for Side Letter No. 3, then there would no basis for notice for an "interest" arbitration over that same matter.

As to Petitioners' claim that all affected employees as well as the BLE were entitled to similar notice and a right to participate in the negotiations (Pet. p. 21), the court below properly rejected this suggestion, citing *McMullans v. Kansas, Oklahoma & Gulf Railway*, 229 F. 2d 50, 56 (10th Cir. 1956), *cert. denied*, 351 U. S. 918 (1956). 26 F. 3d at 791. (Pet. App. 9a.) Indeed to conceive of the event is to refute the idea. No collective bargaining could meaningfully take place were it to be the law that all employees could participate if they elected to do so.

In their Petition to this Court (pp. 20-22), Petitioners rely principally upon RLA Section 3 cases such as *Transportation-Communications Union v. Union Pacific Railroad Co.*, 385 U. S. 157 (1966), *United Transportation Union v. Burlington Northern, Inc.*, 563 F. 2d 1279 (8th Cir. 1977), and *United Transportation Union v. Burlington Northern,*

Inc., 470 F. 2d 813 (8th Cir. 1972), *English v. Burlington Northern Railroad*, 18 F. 3d 741 (9th Cir. 1994); and *Cole v. Erie Lackawanna Ry.*, 541 F. 2d 528 (6th Cir. 1976) where grievance arbitration was involved, not contract negotiation and interest arbitration. Most significantly, in those cases, the party claiming notice and rights to participation in arbitration, either an individual grievant as in *Cole*, or an organization as in *Transportation-Communications Union*, was asserting specific labor contract rights of its or his own that were at issue in the arbitration proceeding.

Petitioners' reliance upon *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board*, 410 F. 2d 1025 (D. C. Cir. 1968) and *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers*, 443 F. 2d 136 (7th Cir. 1971) was properly deemed of no significance by the court below. Both cases involved claims of bargaining participation where there was direct involvement of the claimant organization's labor contract, in the former case, two organizations claiming rights to represent a new class of employees, in the latter case, the claimant organization asserting a right to negotiate to preserve its part of an existing tri-partite agreement.[1]

By contrast, as the court below said, in the present case, no BLE agreement right was involved in the negotiations or arbitration so that no notice or participation was mandated.

---

[1] As to *Brotherhood of Locomotive Firemen and Enginemen v. National Mediation Board*, the Court of Appeals deemed the dispute not one for the courts in any event, but one for the National Mediation Board should the dispute ever become "ripe".

III. THE COURT BELOW DID NOT MISAPPLY SECTION 2 ELEVENTH (C)

In a footnote, Petitioners assert the claim that Side Letter No. 3 violated Section 2 Eleventh (c) of the RLA, 45 U. S. C. Section 152 Eleventh (c). (Pet. 15, fn. 5.) The court below rejected this contention based upon the specific language of Section 2 Eleventh. First, it was noted that by its own terms, subparagraph (c) was plainly a qualifier to subparagraph (a) of Section 2 Eleventh. The qualifier of (c) only operates in regard to an agreement made pursuant to subparagraph (a). Subparagraph (a) concerns an agreement requiring union membership where such is a "condition of continued employment". The seniority agreement in the Side Letter at issue did not create a condition of continued employment. Rather the train service employee working in engine service would continue employment, but would simply have the option of accumulating more train service seniority even though working in engine service upon payment of dues to UTU. 26 F. 3d at 792-94. (Pet. App. 10a-11a).

The cases relied upon by Petitioners (Pet. 10, fn. 5), *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) and *O'Connell v. Erie Lackawanna R. R.*, 391 F. 2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U. S. 210 (1969) plainly involved agreements where union membership was a "condition of continued employment" and the court below properly deemed them of no significance.[2]

---

[2] Contrary to Petitioners' suggestion, while the court below did not identify these cases by name, it did respond to them to

IV. THE SECTION 2 FOURTH CLAIM: THE COURT BELOW DID NOT MISAPPLY *TRANS WORLD AIRLINES, INC. V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS* NOR OTHER DECISIONS OF THIS COURT

The court below did not misapply *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U. S. 426 (1989) and Section 2 Fourth of the RLA. The court of appeals recognized that the primary thrust of Section 2 Fourth's prohibition of carrier "interference or coercion" concerned protection of employee rights of self-organization in the pre-certification period, that is, before a collective bargaining representative is identified or certified under the Act. In doing so, the court below, 26 F. 3d at 795 (Pet. App. 16a-17a), relied upon the precise language of *Trans World Airlines, Inc.* in which this Court noted:

> Section 2 Fourth was enacted as part of the 1934 amendments to the RLA. 48 Stat. 1185. From the time of our very first opportunity to interpret the 1934 amendments, *we have viewed them as addressing primarily the pre-certification rights and freedoms of unorganized employees.* In *Virginian Railway Co. v. Railway Employees*, 300 U. S. 515 (1937), we observed that the employees' freedom "to organize and make choice of their representatives without the 'coercive interference' and 'pressure' of a company union . . . was continued and made more explicit by the amendment of 1934. *Id.*, at 543, citing Section 2

---

reject them as part of an argument, not renewed here, but which the court below saw as not "based . . . upon anything in the record". 26 F. 3d at 793, fn. 5. (Pet. App. 11a, fn. 5.)

> Third, Section 2 Fourth, and *Texas and N. O. R. Co. v. Railway Clerks*, 281 U. S. 548 (1930). In *Switchmen's Union v. National Mediation Bd.*, 320 U. S. 297 (1943), the Court divided over whether the federal courts have jurisdiction under Section 2 Fourth to review a certification of union representatives for collective bargaining by the National Mediation Board acting under Section 2 Ninth of the RLA as amended in 1934. Both the majority and the dissent agreed, however, that *"[t]he 1934 Act was directed particularly at control over the initial step in collective bargaining – the determination of the employees' representatives."* *Id.*, at 317 (Reed, J. dissenting); see also id., at 302 (opinion of the Court); *Machinists v. Street*, 367 U. S. 740, 759 (1961).

489 U. S. at 440-41 (emphasis added).

The "explanation for this pre-certification focus" of Section 2 Fourth was that the RLA is designed to provide for private dispute resolution, and the effectiveness of this process "depends upon the initial assurance that the employees' putative representative is not subject to control by the employer. . . . " 489 U. S. at 439-40.

Nevertheless, the court below recognized that Section 2 Fourth was not exclusively concerned with pre-certification conduct of the employer. In accord with the general purpose of the RLA 1934 amendments to protect the employees' choice of a bargaining agent, and in accord with *Trans World Airlines, Inc.*, at 442 (*Trans World Airlines, Inc.* like the instant matter involved post-certification actions of the employer), the court below held

that after certification, Section 2 Fourth (as well as Section 2 Third) prohibited employer conduct that was motivated by "anti-union animus" or constituted an "attempt to interfere with its employees' choice of their collective bargaining representative". The court below cited its own *Tello v. Soo Line Railroad*, 772 F. 2d 458, 462 (8th Cir. 1985) (as to Section 2 Third) and *National Railroad Passenger Corp. v. International Ass'n of Machinists & Aerospace Workers*, 915 F. 2d 43, 51 (1st Cir. 1990) (as to Section 2 Fourth). Finding "nowhere in the record before us" any evidence of such anti-union animus, interference with bargaining, or hostility toward BLE as bargaining agent, the court properly concluded that summary judgment on both the Section 2 Third and 2 Fourth claims was appropriate. 26 F. 3d at 795. (Pet. App. 17a-18a.)

Other Circuits that have addressed the scope of Section 2 Fourth have been in accord with the court below. In *Dempsey v. The Atchison, Topeka and Santa Fe Railway Company*, 16 F. 3d 832 (7th Cir. 1994), *petition for certiorari pending*, No. 93-2015, the Seventh Circuit Court of Appeals upheld a nearly identical seniority accumulation agreement under Section 2 Fourth concluding that as to post-certification employer action, the complainant must, but did not, show conduct, that in the language of *Trans World Airlines, Inc.*, at 442, would "strike a fundamental blow" to the "collective bargaining process itself". See also, *Renneisen v. American Airlines, Inc.*, 990 F. 2d 918, 922 (7th Cir. 1993); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 789 F. 2d 139, 142 (2nd Cir. 1986).

Section 2 Fourth relief, whether denied or granted, has been deemed available in the post-certification period

where there is an attack on the bargaining process or the bargaining agent. *Compare International Ass'n of Machinists v. Northwest Airlines, Inc.*, 673 F. 2d 700, 706 (3rd Cir. 1982) (limited rights outside the representational context); *Air Line Pilots Association v. Texas International Airlines, Inc.*, 656 F. 2d 16 (2nd Cir. 1981) (Section 2 Third or Fourth relief only where carrier threatens fundamental provisions of the law such as in company union cases, citing *Texas and New Orleans R. Co. v. Railway Clerks*, 281 U. S. 548 (1930)) and *Virginian Railway Co. v. System Federation*, 300 U. S. 515 (1937), *with Air Line Pilots Association v. Transamerica Airlines, Inc.*, 817 F. 2d 510 (9th Cir. 1987), *cert. denied*, 484 U. S. 963 (1988) (diversion of bargaining unit work to subsidiary to eliminate bargaining unit altogether); *Ruby v. Taca International Airlines, S.A.*, 439 F. 2d 1359 (5th Cir. 1974) (removal of crew base to foreign country with likely destruction of bargaining altogether).

The decision below was not in conflict with *Steele v. Louisville & Nashville R. Co.*, 323 U. S. 192 (1944), *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U. S. 435 (1984) nor *Communications Workers v. Beck*, 487 U. S. 735 (1988) as Petitioners suggest. (Petition, pp. 14, 23, 24.) *Steele* concerned an RLA claim of a breach of the duty of fair representation, while *Beck* concerned a fair representation claim under the Labor Management Relations Act ("LMRA"), 29 U. S. C. Section 151 *et seq.* A fair representation claim is a discrete statutory claim under either RLA or LMRA, and no such claim has ever been asserted in the present case. While *Ellis* did concern Section 2 Eleventh of the RLA, it (as well as *Beck* under LMRA) concerned issues of the statutory or constitutional rights of individuals to be free from paying dues to support non-

collective bargaining activities of the collective bargaining representative. No such issues are present here. Finally, in both *Ellis* and *Beck*, the agreements at issue provided that membership in the labor organization was a condition of continued employment whereas the agreement in the present case does not so establish a condition of continued employment.

Because there is authority under the RLA interpreting and applying Section 2 Fourth in the limited fashion described, the court below properly declined to rely upon the above LMRA case law that Petitioner cites, nor additional cases such as *Radio Officers Union v. NLRB*, 347 U. S. 17 (1954) (involving LMRA Section 8 (a)(3) and 8 (b), the latter of which has no counterpart whatever under RLA), *Pattern Makers League v. NLRB*, 473 U. S. 95 (1985) (involving LMRA Section 8 (b) that is without any counterpart whatever under RLA), or the Seventh Circuit's *NLRB v. Manitowoc Engineering Co.*, 909 F. 2d 963 (7th Cir. 1990) (involving again LMRA Section 8 (a)(3) and 8 (b)). This Court has consistently said that while "carefully drawn" analogies from LMRA may be looked to for guidance under RLA, the LMRA "cannot be imported wholesale" into RLA. *Trans World Airlines, Inc.* at 439. As described there and in *Virginian Railway Company, supra*, Section 2 Fourth has its own distinct history that has established the scope of prohibited employer conduct.

The recent *Hawaiian Airlines, Inc. v. Norris*, 512 U. S. ___, 62 U. S. L. W. 4537 (June 20, 1994), relied upon by Petitioners (Pet. 13-14), does not yield a different conclusion. That case involved the issue of pre-emption of state law claims by the RLA where this Court determined to

rely upon LMRA precedent because it was recognized that this Court's RLA decisions concerning pre-emption had long been in accord with its LMRA decisions. There had been a "convergence in the pre-emption standards under the two statutes. . . . " 62 U. S. L. W. at 4541-42.

By contrast, in regard to the Section 2 Fourth protections of employees, this Court's *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants, supra,* demonstrates that there has not been a convergence, but rather differences between the two statutes based upon the language and history of the law. See also, *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U. S. 369, 385, fn. 20 (1969) (Section 2 Fourth RLA employee rights to choose a labor organization not comparable to LMRA where former statute concerned "strongly orgnaized" labor organizations and latter concerned "embryo organizations" in need of greater protections).

Accordingly, the court below did not misapply *Trans World Airlines, Inc.* nor other decisions of this Court, nor misinterpret Section 2 Fourth.

V. CONCLUSION

The decision below was in accord with the language of the RLA, the decisions of this Court, and the authorities in the Circuits. Accordingly, the Petition should be denied.

Respondents The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company have authorized undersigned Counsel of Record to state

that they join in the views and contentions set forth herein.

Respectfully submitted,

NORTON N. NEWBORN
(Counsel of Record)
NORTON N. NEWBORN CO., L. P. A.
24100 Chagrin Blvd., Suite 330
Cleveland, Ohio 44122
(216) 464-1400

Counsel for Respondent
United Transportation Union

Supreme Court, U.S.
FILED
SEP 28 1994
OFFICE OF THE CLERK

No. 94-283

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY, and
UNITED TRANSPORTATION UNION,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONERS' REPLY BRIEF

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PETITIONERS' REPLY BRIEF 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES:

Birkholz v. Dirks, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 4

Bloom v. NLRB, 146 LRRM (BNA) 2986 (8th Cir. 1994) 8

Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co., 768 F.2d 914 (7th Cir. 1985) 6

Communications Workers v. Beck, 487 U.S. 735 (1988) ...2, 4

DelCostello v. Teamsters, 462 U.S. 151 (1983) 6

Dempsey v. Atchison, Topeka and Santa Fe Ry. Co., 16 F.2d 382 (7th Cir. 1994), *pet. for cert. pending*, No. 93-2015 (June 21, 1994) 2

Ellis v. Brotherhood of Railway and Airline Clerks, 466 U.S. 435 (1984) 5

Hawaiian Airlines, Inc. v. Norris, 512 U.S. ___, 62 U.S.L.W. 4537 (U.S. June 20, 1994) 4

Illinois Central R. Co. v. Brotherhood of Locomotive Engineers, 443 F.2d 136 (7th Cir. 1971) 9

O'Connell v. Erie Lackawanna R. Co., 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969) 4

Pattern Makers' League v. NLRB, 473 U.S. 95 (1985) 5

Pennsylvania R. Co. v. Rychlik, 352 U.S. 480 (1957) 4

Radio Officers v. NLRB, 347 U.S. 17 (1954) 5, 6

TABLE OF AUTHORITIES – Continued

Page

Trans World Airlines, Inc. v. Flight Attendants, 489 U.S. 426 (1989) 6, 7

Virginian Ry. v. System Fed. No. 40, 300 U.S. 515 (1937) 7, 9

STATUTES:

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq* ..... *passim*

Railway Labor Act, 45 U.S.C. §§ 151 *et seq* ..... *passim*

Section 2 Third, 45 U.S.C. § 152 Third 5

Section 2 Fourth, 45 U.S.C. § 152 Fourth 3, 5, 7

Section 2 Eleventh, 45 U.S.C. § 152 Eleventh 3, 5

Section 2 Eleventh(a), 45 U.S.C. § 152 Eleventh(a) 3, 4

Section 2 Eleventh(c), 45 U.S.C. § 152 Eleventh(c) 3, 4, 7

Section 10, 45 U.S.C. § 160 2

OTHER:

EXEC. ORDER 12925, 59 Fed. Reg. 48181 (Aug. 31, 1994) 2

L. Kaufman, "Engineers Return As Talks Continue To End Soo Strike," *Journal of Commerce* (Aug. 25, 1994), p. 1A 2

No. 94-283

In The

Supreme Court of the United States

October Term, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
H. L. SMITH, G. D. McLAUGHLIN
and L. D. WILSON,

Petitioners,

vs.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
LOUISIANA & ARKANSAS RAILWAY, and
UNITED TRANSPORTATION UNION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONERS' REPLY BRIEF

As we explained in our Petition, this case involves issues of substantial public importance: whether employees covered by the Railway Labor Act, ("RLA") 45 U.S.C. §§ 151 *et seq.*, have the same rights of freedom of association in the payment of union fees and freedom from compulsory dual unionism as do their counterparts under the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, or, instead, may be required to pay union fees in order to maintain and accumulate seniority

in a craft while forced to work in another craft represented by a different union. The conclusion reached by the Court of Appeals for the Eighth Circuit, which tracks the decision of the Seventh Circuit in *Dempsey v. Atchison, Topeka and Santa Fe Ry. Co.*, 16 F.3d 382 (7th Cir. 1994), *pet. for cert. pending*, No. 93-2015 (June 21, 1994), is in direct conflict with rulings under the NLRA of this Court, the various courts of appeals, including the Seventh and Eighth Circuits, and the National Labor Relations Board. If the decision below is permitted to stand, petitioners respectfully submit that employees under the RLA will receive vastly different treatment as to payment of union fees than those employees covered by the NRLA, even though this Court has consistently held that the permissible scope of union fee arrangements under the federal labor law is identical for railway employees, public employees and all other employees. *See Communications Workers v. Beck*, 487 U.S. 735, 762 (1988).

The effort of respondent United Transportation Union ("UTU") to depict this case as unique and not likely to lead to substantial labor disruptions in the future is refuted by the labor dispute that arose between the Soo Line Railroad and UTU following the filing of our petition in this case. One of the major items that UTU was demanding from that rail carrier was a seniority maintenance fee agreement. L. Kaufman, "Engineers Return As Talks Continue To End Soo Strike." *Journal of Commerce*, (Aug. 25, 1994), p. 1A. This strike and UTU's refusal to withdraw this demand, among others, eventually led to the appointment of Presidential Emergency Board No. 225 pursuant to Section 10 of the RLA, 45 U.S.C. § 160. *See* EXEC. ORDER 12925. 59 Fed. Reg. 48181 (Aug. 31, 1994).

As the next round of negotiations rears its head in the rail industry, it can be expected that UTU will expand its efforts to obtain these fee requirements, which will lead to labor turmoil adverse to the public interest. Conversely, petitioner Brotherhood of Locomotive Engineers ("BLE") will resist and may also pursue efforts to obtain similar or even broader fee arrangements, thereby requiring locomotive engineers/train service employees to pay fees to both unions in violation of the clear language of 45 U.S.C. § 152 Eleventh (c). In short, the public and the individual employees will bear the brunt of this dispute until an authoritative resolution of the validity of such arrangement is rendered.

UTU's sole effort to distinguish this case from the established precedent under the federal labor law developed under the NLRA is that it falls under a different statute, the RLA. That the issue arises under the RLA, not the NLRA, is insufficient in itself to justify the decision below. In fact, neither the court below nor UTU has ever explained how this fee agreement is valid under the RLA, when the sole kind of fee agreement permissible under Sections 2 Fourth and Eleventh is what is called a union shop provision, which respondents say the side letter is not.

If the side letter to the arbitration award, which sets forth the requirement that "full dues to the UTU" will be required in order to maintain and accumulate train service seniority, is not a qualified union security agreement under Section 2 Eleventh (a) of the RLA, 45 U.S.C. § 152 Eleventh (a), it is banned by the unequivocal language of Section 2 Fourth, 45 U.S.C. § 152 Fourth, which bars railroads from collecting or assisting in the collection of

monies for unions from its employees. Standing the statute on its head, the court below assumed without explanation that any union fee arrangement that is not a "union shop" agreement, which it defines as a requirement to pay a fee to prevent employment termination, can be legally imposed by an employer and union upon any employee. However, if UTU's seniority maintenance fee must qualify as a union security arrangement within the meaning of Section 2 Eleventh (a), and does so qualify, it nonetheless is prohibited as to the individual petitioners by reason of Section 2 Eleventh (c), which permits any operating employee, engineer or trainperson, to pay dues to either BLE or UTU in satisfaction of any such requirement. *See Pennsylvania R. Co. v. Rychlik*, 352 U.S. 480, 490-492 (1957); *Birkholz v. Dirks*, 391 F.2d 289 (7th Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969); *O'Connell v. Erie Lackawanna R. Co.*, 391 F.2d 156 (2nd Cir. 1968), *vacated as moot*, 395 U.S. 210 (1969).

Moreover, the union fee provisions of the RLA and NLRA have been considered to be statutory equivalents, and the precedent under one statute has been uniformly applied to the other. *Communications Workers v. Beck*, 487 U.S. 737, 745-747 & nn. 3, 4 (1988). The response in the opinion below and by UTU is only that this is not a union shop agreement. This reply is totally inadequate in light of the three facet test recently expressed by the Court, which is easily met in this case, for the common purposes of the equivalent statutory provisions, their parallel development, and desired uniformity or harmony between these provisions dictates that the well-established precedent under the NLRA should be applied in this similar RLA situation. *See Hawaiian Airlines, Inc. v.*

Norris, 512 U.S. ___, 62 U.S.L.W. 4537, at 4542 n. 9 (U.S. June 20, 1994).

The NLRA precedent requires the conclusion that Side Letter No. 3 is illegal on its face. Any scheme that has the effect (even unintended) of encouraging or discouraging employees in their attitudes toward union membership or the payment of dues to the union, including one that could cause a loss of or reduction in seniority ranking as a result of nonpayment or fosters different treatment as to wages or vacation benefits, is illegal under the NLRA. *Radio Officers v. NLRB*, 347 U.S. 17 (1954). In sum, the scheme is outlawed, even though nonpayment causes disparate treatment of a nature that is less than loss of the person's job. *See Pattern Makers' League v. NLRB*, 473 U.S. 95, 107 (1985).

In addition to the prohibition contained in the specific language of Sections 2 Fourth and Eleventh, the seniority protection scheme, which in effect represents a UTU organizational protection scheme, conflicts with the policy of free choice and union voluntarism set forth in both the RLA and NLRA. *Ellis v. Brotherhood of Railway and Airline Clerks*, 466 U.S. 435, 445-447 (1984); *Pattern Makers' League v. NLRB*, 473 U.S. 95, 127 (1985). Any dues collection scheme that encourages dues payments to one union and discourages dues payments or membership in another union, even though it does not affect the employee's continued employment with the employer, violates Sections 2 Third, Fourth and Eleventh of the RLA. Therefore, even though the engineers/trainmen may only suffer a reduction in trainmen's seniority ranking, the anti-BLE effects of the scheme should have been reasonably anticipated by the railroad and UTU, and

petitioners were not required to produce any admission by KCS or UTU that the agreement was intended to encourage membership in UTU at the expense of BLE. *Radio Officers v. NLRB*, 347 U.S. 17 at 39-40, 42 (1954).

The lower courts also rejected this contention on the basis that the statutory design under the RLA is different from that of the NLRA. In addition, the court below concluded that since this was postcertification conduct, the rationale enunciated in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), did not permit a holding that the seniority protection fee was illegal as a matter of law. Rather, in the lower court's view, petitioners were required to produce evidence that Kansas City Southern was motivated by anti-union animus or was attempting to interfere with the choice of its engineer employees of the BLE as their collective bargaining representative. Under the Court of Appeals' ruling, the determination as to the legality of the seniority maintenance fee must wait until its effects upon BLE can be determined in the future. This "wait-and-see" approach is factually and legally defective.

The "wait-and-see" approach is illogical: Does BLE have to wait until UTU is able to successfully mount a representation election before the scheme may be considered an attempt to interfere with BLE's choice as the craft representative for locomotive engineers? To wait until BLE's financial support has been eroded may be too late to act in light of the six-month limitations period under *DelCostello v. Teamsters*, 462 U.S. 151 (1983). *See Brotherhood of Locomotive Engineers v. Atchison, Topeka & Santa Fe Ry. Co.*, 768 F.2d 914 (7th Cir. 1985). Furthermore, where, as here, there is a clear statutory violation of Section 2

Fourth, *i.e.*, the collection of union fees other than union shop obligations, and, where as here, there is no satisfactory forum other than the federal courts to resolve the dispute and with authority to issue an appropriate remedy, the courts should rule on the controversy without a prior factual showing of intended interference or coercion. *Virginian Ry. v. System Fed. No. 40*, 300 U.S. 515 (1937); *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 441 (1989). As we pointed out in our Petition, contract validity questions are for the courts and this case involves a contract validity question. Pet. 19. The contractual validity test is the only appropriate standard to follow in this case – not a wait-and-see approach.

UTU has offered no justification whatsoever for relieving the carrier and it from the Section 2 Fourth obligation or for denying the employees involved of their right to join the union of their choice and their additional right to be free of compulsory dual unionism as set forth in Section 2 Eleventh (c). Assuming for the sake of argument that fee requirements that are something less than union shop agreements are permissible – and we do not suggest they are – this side letter does not qualify. First, the side letter requires payment of "full dues." The term "full dues" is clearly an euphemism for "UTU membership." Moreover, contrary to the suggestion of UTU, the side letter specifies that "full dues" must be paid to "maintain" train service seniority. The payment is not limited to accumulation of future credits. Under the circumstances, it is distinctly clear to every trainman/engineer that payment of the "full dues" to UTU will meet both UTU's seniority maintenance fee requirement and

the BLE/UTU union shop requirement, thereby encouraging membership in UTU and discouraging membership in BLE. UTU and the carrier had to understand that at the time the side letter was imposed. Accordingly, the railroad employer and UTU, as reasonably intelligent entities, had to know that the side letter struck a fundamental blow to BLE's status as craft bargaining agent and to the collective bargaining process itself. And the Court of Appeals for the Eighth Circuit recognized this theory in an NLRA case decided after the decision it handed down herein. In *Bloom v. NLRB,* 146 LRRM (BNA) 2986 (8th Cir. 1994), that court refused to enforce a settlement over a union shop clause that used the phrase "member in good standing," because that language "implied" that the clause could be used to indirectly enforce non-financial union regulations. *Id.*, 2989. That same logic required Side Letter No. 3 be set aside as violating the RLA.

Finally, some note must be taken of UTU's assertion that petitioners had no RLA right to notice of or participation in the arbitration that led to the insertion of side Letter No. 3 to the Award and that the side letter was within the jurisdiction of Crew Consist Arbitration Board No. 4. While the court below and UTU claim there is no substance to this issue, the Board itself perceived some difficulty with it, stating:

> Finally, it should be pointed out that, subsequent to the oral arguments on december (sic) 18 and 19, 1991, this Board encouraged the parties to try to find solutions to as many of their problems as possible. In some areas, the parties were successful. This would explain certain terms and conditions below which appear to be technically outside the parameters of this

> Board's jurisdiction, as well as beyond the issues initially submitted to this Board for resolution. Those terms and conditions were added at the request and by the agreement of the parties, including the Questions and Answers.

A.A.36.

That the Award and side letter between KCS and the trainmen's union dealt with matters arising in and involving the craft of locomotive engineers certainly made it suspect and gave the document the aura of crossing into matters within BLE's jurisdiction and interfering with its collective bargaining rights and responsibilities. Where the matter of union fee payments, among others, had been since at least 1951 the subject of joint handling and similar agreements and where any tampering with that arrangement could affect the financial viability of the organization and its ability to administer its bargaining agreements for persons working as locomotive engineers, BLE had a bargainable interest in the subject matter of Side Letter No. 3 and should have been given notice and allowed to participate in those negotiations. *See, e.g., Virginian Ry. v. System Fed. No. 40,* 300 U.S. 515 (1937); *Illinois Central R. Co. v. Brotherhood of Locomotive Engineers,* 443 F.2d 136 (7th Cir. 1971). Under the circumstances existing here, the side letter was not within the jurisdiction of the Board and should have been set aside.

CONCLUSION

For these reasons and those stated in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113-1740
(216) 861-1313

Counsel for Petitioners